WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JASON GOTHARD, ***Applicant***

COUNTY OF SONOMA/SHERIFF'S DEPARTMENT, PSI, administered by INTERCARE HOLDINGS INSURANCE SERVICES, INC., ***Defendants***

Adjudication Number: ADJ10788304
Santa Rosa District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O) issued on April 23, 2026 by a workers' compensation administrative law judge (WCJ). The WCJ found that applicant sustained a cumulative trauma injury arising out of and in the course of his employment to his psyche (psychiatric CT injury or injury) during a period ending February 6, 2017 based on the substantial reporting of panel qualified medical evaluator (QME) Robert Mosby, PhD; the injury was caused by mandated overtime, interactions with inmates, and a February 6, 2017 incident with two sergeants; the February 6, 2017 incident was a good faith personnel action that constitutes 55% of the causation of applicant's injury; and, thus, applicant's injury was substantially caused by a good faith personnel action. The WCJ ordered that applicant take nothing on his claim in ADJ10788304.

Applicant contends that the WCJ failed to address the underlying issue identified in the Opinion and Decision after Reconsideration issued on April 11, 2022 by the Appeals Board (*Jason Gothard v. County of Sonoma*, 2022 Cal.Wrk.Comp. P.D. Lexis 118 (*Gothard*)), that there was no good faith personnel defense analysis related to applicant's psychiatric CT injury claim (*Rolda v. Pitney Bowes* (2001) 66 Cal.Comp.Cases 24 (Appeals Bd. en banc) (*Rolda*)), but instead the WCJ reiterated and adopted the prior *Rolda* analysis related to the rescinded finding of specific injury. Applicant also contends that QME Dr. Mosby's reporting does not provide substantial evidence to support the WCJ's finding that applicant's injury was "substantially caused by lawful, nondiscriminatory, good faith personnel actions" pursuant to Labor Code[1] section 3208.3; but, that the reporting of applicant's primary treating physician (PTP) Melissa Staehle, Ph.D., does provide substantial evidence to conduct the necessary *Rolda* analysis related to applicant's CT injury.

In addition, applicant contends that the WCJ failed to rule on the admissibility of the July 3, 2018 report of Gordon Baumbacher, M.D., an independent medical examiner in applicant's disability retirement proceedings, which is material to the question of whether Dr. Staehle was provided with the same documentary evidence as QME Dr. Mosby (one of the bases for the WCJ's rejection of Dr. Staehle's as substantial evidence).

Defendant filed an Answer to Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), recommending that the petition be denied.

We have reviewed the record in this matter, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. Based on our review of the record and for the reasons set forth below, we grant reconsideration. It is our decision after reconsideration to rescind the F&O and return this matter to the trial level for further development including evaluation and review of the medical record by a regular physician pursuant to section 5701 and further proceedings consistent with this decision and the decision in *Gothard*.

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. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (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.

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

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 June 3, 2026 and 60 days from the date of transmission is Sunday, August 2, 2026. The next business day that is 60 days from the date of transmission is Monday, August 3, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, August 3, 2026, so that we have timely acted on the petition as required by 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 June 3, 2026, and the case was transmitted to the Appeals Board on June 3, 2026. 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 section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on June 3, 2026.

II.

As an initial matter, applicant requests that a ruling be made on Applicant's Exhibit 24, a July 9, 2018 report of Gordon Baumbacher, M.D. (Exhibit 24), who acted as an independent medical examiner (IME) in applicant's disability retirement proceedings. (Petition for

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

Reconsideration, p. 7.) Defendant objected to the admissibility of Exhibit 24 at the October 18, 2018 trial because it was not available at the time of the Mandatory Settlement Conference, and because it was obtained in a non-workers' compensation proceeding. (Minutes of Hearing and Summary of Evidence, October 18, 2018 (2018 MOH), p. 5.) The WCJ was to rule on the admissibility of Exhibit 24 at the time of decision. (*Ibid.*) No such ruling was made by the WCJ in the rescinded decision or in the current F&O.

First, we overrule defendant's objection that Exhibit 24 was not available prior to the Mandatory Settlement Conference (MSC). The WCJ did not close discovery until the August 9, 2018 MSC and ordered the parties to serve all exhibits within 15 days of the MSC. (Pre-Trial Conference Statement, p. 1.) The "Report of Gordon Baumbacher" was identified as an exhibit by applicant on the Pre-Trial Conference Statement. (*Id*. at p. 7.) Therefore, applicant complied with the order of the WCJ regarding discovery of the report.

Next, defendant's objection that Exhibit 24 is not *admissible* because it was obtained in a non-workers' compensation proceeding is overruled. In *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231 [78 Cal.Comp.Cases 1209] (*Valdez*), the California Supreme Court analyzed the admissibility of medical reports in workers' compensation proceedings and stated in pertinent part:

> [T]he comprehensive medical evaluation process set out in section 4060 et seq. for the purpose of resolving disputes over compensability does not limit the admissibility of medical reports … Under section 4064, subdivision (d), "no party is prohibited from obtaining any medical evaluation or consultation at the party's own expense," and **"[a]ll comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board …" except as provided in specified statutes.** The Board is, in general, broadly authorized to consider "[r]eports of attending or examining physicians." (§ 5703, subd. (a).) **These provisions do not suggest an overarching legislative intent to limit the Board's consideration of medical evidence.**

(*Valdez*, *supra*, at p. 1239, bold added.)

Applicant has the statutory right to submit a self-procured consulting physician report to an authorized treating physician. (Lab. Code, § 4605; see Lab. Code, § 4064, subd. (d).) However, a self-procured consulting physician report "shall not be the sole basis of an award of compensation" (Lab. Code, § 4605); nor shall such a report be used "for the sole purpose of rebutting the opinion of the qualified medical expert..." (*Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009, 1015 [80 Cal.Comp.Cases 1256].)

Accordingly, we grant reconsideration and as our decision after reconsideration, we issue an order to admit applicant's Exhibit 24 into evidence and the record of these proceedings, for the limited purpose for which it may be considered as stated herein.[3]

III. STATEMENT OF FACTS

We incorporate the facts set forth in the *Gothard* decision:

> Defendant filed an application for adjudication on behalf of applicant on March 14, 2017, when applicant was not yet represented. (Application for Adjudication of Claim (Application), March 14, 2017.) Defendant plead applicant's injury as a specific injury that occurred on February 6, 2017, resulting from a feeling of being trapped in an office by two Sergeants. (*Id*., ¶¶ 1-2.) Defendant appears to have relied on applicant's first report of injury (Def. Exh. C, Supervisor's Report of Occupational Injury/Illness/Exposure, February 13, 2017), and the DWC-1 claim form, wherein applicant identified the February 6, 2017 meeting as the injury (Def. Exh. A, DWC-1, February 21, 2017).
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> At the time defendant filed the Application, defendant was already in receipt of a report from treating physician Melissa Staehle, Ph.D., stating that applicant sustained a **"cumulative anxiety reaction" to his workplace caused by mandatory overtime, violent incidents with inmates, and the February 6, 2017 meeting with two of his Sergeants**. (App. Exh. 12, dated March 3, 2017, p. 6, emphasis added.)
>
> This matter went to trial on October 8, 2018 on the following issue: "The date of injury, with the current claim of date of injury being a specific injury on February 6, 2017, and the Applicant suggesting that the evidence will show that the appropriate date of injury is cumulative trauma ending on February 6, 2017." (Minutes of Hearing and Summary of Evidence (MOH), October 8, 2018, pp. 2-3.) Additional issues included the statute of limitations. (Ibid.)

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[3] Applicant seeks to admit Exhibit 24 because he alleges it was reviewed by PTP Dr. Staehle, including the medical records review of Kaiser records dated from June 27, 2007 through May 3, 2018. (App. Exh. 24, pp. 22-24.) Given that the WCJ states in the Report that "it appears that Dr. Staehle did not review applicant's Kaiser records," applicant correctly contends that Exhibit 24 would be relevant to establish that Dr. Staehle reviewed Dr. Baumbacher's medical record review of applicant's Kaiser records. However, and although Dr. Staehle noted on July 13, 2018 that Exhibit 24 *would be* sent to her, we cannot find confirmation in the record that the report was in fact sent to Dr. Staehle or that she reviewed the report. (See App. Exh. 2, Dr. Staehle's Notes, p. 3.) We cannot find a reasonable inference that Dr. Staehle *did* review Exhibit 24 from the July 13, 2018 notation because Dr. Stahle's note did not say that once received, she would review the report; Dr. Staehle did not issue a supplemental report following that note; and, given that Dr. Staehle's notes stopped on July 13, 2018. We therefore do not admit Exhibit 24 as evidence of Dr. Staehle's review of Dr. Baumbacher's medical record review, which included applicant's Kaiser records.

On February 25, 2019, the WCJ issued an "Order of New Date of Injury, New Board Number, and Resubmission of Cases for Decision" (New Date of Injury Order), wherein the WCJ ordered a new adjudication number issued for what he referred to as "a previously unfiled date of injury, a cumulative trauma injury to the applicant's psyche through his last day worked, February 6, 2017..." (Order, signed February 22, 2019, issued February 25, 2019.)

The F&O issued on May 13, 2019 ordering that applicant take nothing in either of the specific or the cumulative trauma injury claims. (F&O, Order.) The WCJ found that while applicant did sustain a specific, psychiatric injury arising out of and in the course of his employment on February 6, 2017, the injury was "caused by a lawful, nondiscriminatory, good faith personnel action." (*Id*., Findings of Fact nos. 4-5.)

The WCJ also found that applicant sustained a cumulative trauma injury to his psyche "arising out of and in the course of his employment for the period ending February 6, 2017," and that applicant's date of injury pursuant to Labor Code section 5412 was July 3, 2017, the date of a report from qualified medical evaluator (QME) Robert D. Mosby, Ph.D. (*Id*., Findings of Fact nos. 7-10; see App. Exh. 17, Mosby report, July 3, 2017.) Finally, the WCJ found that pursuant to section 5405, "applicant commenced benefit collection proceeding on August 9, 2018 when the issue of cumulative injury was raised at the Mandatory Settlement Conference." (*Id*., Findings of Fact no. 12.)

The WCJ explained his findings that applicant sustained both a specific and cumulative trauma injury as follows:

> Following the meeting, Deputy Gothard was referred by his employer to Dr. Staehle, a psychologist, for "evaluation and possible treatment." *See Applicant's Exhibit 12, report of Dr. Staehle at pg. 1) **She characterized his injury as "cumulative anxiety reaction" due to stress at work.** (Id.) Doctor Staehle treated Deputy Gothard at the expense of the County of Sonoma for the period March 3, 2017 through March 31, 2017. (See Applicant's Exhibit I, deposition transcript of Dr. Staehle at pg. 12:11-16). Thereafter, the provision of medical treatment to Deputy Gothard ended. Deputy Gothard continued receiving treatment at his own expense. (Id.)
>
> Doctor Mosby evaluated Deputy Gothard as a Qualified Medical Evaluator in the specialty of psychology. He initially characterized Deputy Gothard as having sustained two injuries: a cumulative trauma due to "mandated overtime" and "incidents with inmates" and a specific injury due to "the incident with Sergeants Jiminez and MacLeod. **(See Applicant's Exhibit 17, report of Dr. Mosby at pg. 13).** This was later revised to reflect that 55% of the applicant's injury was due to the specific incident with Sergeants Jiminez and MacLeod, 40% to the stress of

> overtime and 5% to incidents with inmates. (See Applicant's Exhibit 14, report of Dr. Mosby dated 5/5/2018 at page 3).
>
> **Strictly speaking, Dr. Mosby characterized all three stressors as a part of a "cumulative anxiety injury".**
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> (F&O, Opinion on Decision, pp. 2-3, errors in the original, emphasis added.)

The WCJ further clarified his findings in the Report:

> Doctor Mosby evaluated Deputy Gothard as a Qualified Medical Evaluator in the specialty of psychology. He initially characterized Deputy Gothard as having sustained two injuries: a cumulative trauma due to "mandated overtime" and "incidents with inmates" and a specific injury due to "the incident with Sergeants Jiminez and MacLeod. **(See Applicant's Exhibit 17, report of Dr. Mosby at pg. 13).** This was later revised to reflect that 55% of the applicant's injury was due to the specific incident with Sergeants Jimenez and MacLeod, 40% to the stress of overtime and 5% to incidents with inmates. (See Applicant's Exhibit 14, report of Dr. Mosby dated 5/5/2018 at page 3).
>
> Procedurally, this case came to trial on October 8, 2018. Testimony was taken, and the case was submitted for a decision. After reviewing the record in detail, this court determined that rather than a single injury with two causes — stress due to overtime and the meeting with sergeants Jimenez and MacLeod — there were two distinct injuries. As the case as pled alleged a specific injury on February 6, 2017, the court issued notice of intent to issue a second ADJ number with a second date of injury, cumulative trauma through February 6, 2018. Receiving no objection, ADJ1946779 issued and a Joint Findings and Order was issued for both cases." (Report, pp. 4-5, emphasis added.)

The citation relied on by the WCJ in Dr. Mosby's July 3, 2017 report states that:

> **Mr. Gothard was diagnosed by Dr. Staehle on 03/03/17 with Unspecified Trauma and Stressor Disorder with moderate symptoms. I believe this is an accurate diagnoses** and I would add to Dr. Staehle's initial diagnosis the following: F41.0 Unspecified Anxiety Disorder; F43.0 Acute Stress Disorder; and F32.1 Major Depressive Disorder, Single Episode, Moderate Symptoms.
>
> **From both the Beck Anxiety Inventory and the MMPl-2 Mr. Gothard is suffering from anxiety especially in situations where he feels threatened in some form.** In addition, Mr. Gothard has a history of twice seeing physicians at Kaiser Permanente for his stress to the required

> overtime at the Sonoma County Jail. Individuals deal with stress in different ways and for Mr. Gothard his stress was triggered because he did not have enough time to recover from his shifts at the Sonoma County Jail and especially it was triggered when he began working on the Mental Health Unit of the Jail. Mr. Gothard has suffered depression as a result of being out of work and the difficulty that does to one's self-esteem. This is supported by his score on the Beck Depression Inventory and his elevated score on the depression scale of the MMPl-2. (App. Exh. 17, Mosby report, July 3, 2017, p. 13, emphasis added [the rest of p. 13 is Dr. Mosby eliminating a personality disorder as a diagnosis].)

Dr. Mosby's July 3, 2017 report diagnoses a cumulative trauma injury:

> **All of these causes strongly suggest a cumulative anxiety reaction to numerous events at his workplace.** Therefore it is with reasonable medical probability that the industrial stressors combined are more than 51% responsible for his condition. **It should also be noted that Dr. Staehle, who made an initial evaluation on 03/03/17 and is also a QME qualified evaluator, made the same conclusion.** (*Id*., p. 14, emphasis added.)

In response to a question about the February 6, 2017 meeting identified by defendant in the Application, and relied on by the WCJ to support his finding of a specific injury, Dr. Mosby states, "Clearly this is a cumulative injury and not specific to one situation." (*Id*., p. 14., underline in the original, bold added.)

> <u>Of the overall psychological condition, what percentage of his condition and the need for disability/medical treatment was due to the meeting/personnel action with Sergeants Jimenez and Macleod? (Please defer the "good faith" nature of that meeting to the judge/trier of fact.)</u>
>
> In my interview with Mr. Gothard I specifically asked him this question. **Clearly this is a cumulative injury and not specific to one situation.** My question to Mr. Gothard was that there are a lot of things affecting you and your stress and anxiety and what would you say are the percentage causes of each. Mr. Gothard stated that 40% of his stress and anxiety was due to the mandated overtime, 40% was due to the incident with Sergeants Jimenez and Macleod and 20% was due to incidents with inmates and working on the mental health unit. In my interview with Mr. Gothard I believe that these are reasonable approximations to the influence of each factor. **Therefore it is with reasonable medical probability that Mr. Gothard's industrial injury is a cumulative anxiety injury** attributable to 40% because of mandated overtime, 40% to the incident with Sergeants Jimenez and Macleod and 20% to incidents with inmates and working on the mental health unit and the stress that that particular assignment entails.

<u>Please be sure to discuss what event/events/stressors caused him to go off work. and how that plays into your percentage breakdown of causes, whether from the meeting, "general stressors", or other causes.</u>

> Please see the answer above. (*Id*., p. 14., underline in the original, bold added.)

In addition, Dr. Mosby reported applicant to be a credible patient who was frank, open, and truthful. (*Id*., pp. 10-11; App. Exh. 16, Mosby report, February 12, 2018, p. 13.)

On March 26, 2018, and after reviewing 680 pages of Kaiser records and the depositions of Sergeants Jimenez and MacLeod, Dr. Mosby responds to the question of whether the records support his prior conclusions about causation: "The short answer is yes these records support my prior conclusions about causation." (App. Exh. 15, Mosby March 26, 2018 Report, pp. 3-4.)

Dr. Mosby then references diagnoses made in 2015 by Kaiser of "acute stress disorder primary... from working and it goes on to state that the stress is, 'not so much the job but the hours and the number of days in a row'. [sic]" (*Ibid*.) He also mentions another Kaiser diagnosis of: "'Stress-primary, anxiety, major depressive disorder, recurrent episode, moderate, and lymphadenitis'. [sic]," resulting in a work note for time off work. (*Ibid*.) Also in 2016, there is an August 2016 Kaiser record involving an inmate throwing urine on him, as well as another September 2016 Kaiser diagnosis of "major depressive disorder, recurrent episode, mild-primary," which appears to have resolved in October 2016. (*Ibid*.) The final Kaiser record mentioned is the February 11, 2017 record about the meeting with the Sergeants resulting in a "triage call for anxiety." (*Ibid*.)

The deposition of Dr. Staehle went forward on March 16, 2018. (App. Exh. 1, Deposition of Melissa Staehle, Ph.D., March 16, 2018.) During defendant's questioning, Dr. Staehle explained that public safety officers with post-traumatic stress disorder (PTSD) often "hit a wall" at which point they cannot function after years of stress on the job, and often attribute their injury to the last stressful experience:

> Q. **His claim is denied. And now we see all the emphasis is on cumulative stress. Do you think that there might be a personal motivator to change the basis for the claim, in order to get his claim accepted?**
>
> MS. ROSENTHAL: I'm going to object that that mischaracterizes the --
>
> BY MR. HARBAUGH:

> Q. Well, do you see anything in the six months in the medical history or anything in terms of his claim that indicated that it was anything other than the incident of 2/7/17?
>
> A. **I've told you, I see lots of reasons.** I don't think these people are experts at diagnosing themselves. So at that point he hit the wall. He hit the wall, he couldn't even show up at that point. He says, well, it's because of that. But by the time he comes back, the second his wife's saying, "Did you tell her about how you've been for the last five years, how irritable you are at home, how you're yelling at the kids, calling in sick? Did you tell her about the Kaiser visit for stress over the years?"
>
> So I think it's easy, when you file a claim right then, not to say -- to analyze the whole entire situation. **I see it all the time with public safety officers. By the time they see me with PTSD, where they can't function, they can't go back to work, it has been building years, whether it's the drinking, the — all kinds of multiple factors. So no, I think the fact he didn't mention his whole history of stress in some detail, in some analysis, is not — he's suddenly changing things to benefit himself; no. It's consistent with what I've seen.** (*Id*., at pp. 35-36, emphasis added.)

On May 5, 2018, Dr. Mosby concluded as follows:

> There is no doubt that there is a cumulative injury here...The issue with a cumulative injury is when does the injury reach the stage where the employee can no longer work due to that injury... **As Dr. Staehle stated in her deposition the incident with the two sergeants was the straw that broke the camel's back...** (App. Exh. 14, Mosby May 5, 2018 Report, p. 3, emphasis added.)

(*Gothard*, *supra*, at *2-14, all emphasis in the original.)

Following the April 2022 decision in *Gothard*, QME Dr. Mosby issued a brief, supplemental report changing the percentage causation of the February 6, 2017 meeting yet again, from 55% to "at least 51%." (Def. Exh. I, QME Dr. Mosby report, October 10, 2022, p. 1.) His full opinion is stated as follows:

> My original Rolda analysis remains undisturbed regardless of whether his injury stems from a specific or cumulative trauma. I would like to state that it is difficult for me to understand how someone could conclude that Mr. Gothard had two separate injuries. From a psychological perspective a person's life is connected in terms of how events affect them, especially when the events are all associated with the same work place. **Stress is cumulative and builds over time when someone continues to experience stressful situations day after day in the**

> **work place. Of course, someone is going to say a specific event caused their injury because they have to site something that made them break so to speak. But in fact, the stress for Mr. Gothard was building over time and that is documented by his various visits to Kaiser for his stress and anxiety.** In my opinion, as stated in the QME report for Mr. Gothard, his injury is a cumulative trauma injury.
>
> **The event that triggered his cumulative trauma becoming out in the open was the interaction with the two sergeants. It is still my opinion that this event was at least 51% casual in his psychiatric injury.**
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> Essentially everything in my QME report for Mr. Gothard remain as originally written.

(Def. Exh. I, QME Dr. Mosby report, October 10, 2022, p. 1, bold added.)

The parties deposed QME Dr. Mosby on June 17, 2024. (Def. Exh. J, Zoom Deposition of Dr. Robert Mosby, June 17, 20124.) Dr. Mosby testified that the basis for assigning "at least 51%" of the cause of applicant's psychiatric CT injury to the February 6, 2017 injury was applicant's subjective perception during the one in-person session he had with applicant, that "he felt he would still be working there if they hadn't done that to him. So that says to me it had quite a – that had quite an effect on him." (*Id.*, pp. 14-15.)

Dr. Mosby also reiterated that he reviewed applicant's Kaiser records and personnel file reflecting that applicant's stress had definitely built over time as documented by mandatory overtime since 2014 and visits to Kaiser for stress and anxiety since 2015 (see App. Exh. 15, Mosby March 26, 2018 Report, pp. 3-4, *supra*). (*Id.*, pp. 7-8, 20.) **In fact, Dr. Mosby agreed that applicant had a compensable claim for psychiatric CT injury *prior to the February 6, 2017 meeting*.** (*Id*., pp. 8-9, 16, 20-21.) When asked why the February 6, 2017 meeting was therefore "even relevant in terms of his condition," Dr. Mosby responded as follows:

> Well, it's - - that's a good question, you know. **And in instances like this, we're guessing. And it's my opinion that people that have a cumulative trauma injury, usually there is some event that sets them off. But the injury, the trauma, has been longstanding prior to that event. So, certainly, the event with the two sergeants was the straw that broke the camel's back for Mr. Gothard. But he was certainly stressed severely prior to that, yes,** if that's your question.
>
> . . .
>
> But I understand what you're saying. And, I mean, it's a difficult question. In re-reading all of these reports, I noticed that Dr. Staley [*sic*]was that her name?

> Q. Dr. Staley [*sic*], yes.
>
> A. She said that she thought it was 90 percent attributable to the [*sic*] his work and his overtime, and only 10 percent to the sergeants. And I attributed a different amount. **If it were me, if it was up to me to make the rules in situations like this, I would always go by the treating therapist, because I think the treating therapist has more contact with the injured worker than I do. I mean, my contact with Jason was the three and a half hours that we spent together. So in that time that I spent with him, you know, he did say, "I think I would still be working there if the sergeants hadn't done that to me." So that said to me that that had a lot to do with it. However, when you're working with somebody on a weekly basis, he could have said that in the session, and the next week he could have come in and said, you know, "I thought about what I said last week, and I don't think that's true.** I really think it's more like this." So I have to go by what I encounter with that person, not by what Dr. Staley encountered with him. <u>**But if there was a choice between me and her, I would go with her assignment of percentages, because I think she has more contact with him and more understanding of what's going on with him.**</u>

(Def. Exh. J, Zoom Deposition of Dr. Robert Mosby, June 17, 2024, pp. 9-12, all emphasis added.)

When asked whether he was changing his prior opinions about the causative percentage of the February 6, 2017 meeting, Dr. Mosby responded as follows:

> Q. Okay. And really, what I'm just trying to get at, Doctor, is despite your testimony here today, are you in any way changing or amending your opinions as to your specific opinion on causation, that being that the 55 percent of the overall disability was caused by the interaction with the supervisors?
>
> A. **Well, I understand your question. I understand both of your questions. And it's difficult for me to say, because what I have to go through, in my opinion, as a QME, is I have to go by what happens in the session that I have with the injured worker. And so based upon my contact with him, I would say, yes.** Based on my contact with him and what he said to me, I think that 55 percent would be a reasonable amount to assign to the sergeants taking him in and doing what they did with him. **However, as I said earlier, if I had a session with Jason the next week and he said, you know, "I thought about what I said. I don't know if that's really true" that could easily happen. That's why I think a lot of credibility needs to go to what Dr. Staley [*sic*] said, because she's the one that had continuing care with him over a long period of time.** And when you work with people over months, you begin to realize that they're consistent about what they say or they're inconsistent about what they say. **And I'm sure that she got a different picture than I did based upon, one, having spent more time with him; and two, having heard the**

> **consistency or inconsistency of what he said to her that he felt was the causation of it.**

(Def. Exh. J, Zoom Deposition of Dr. Robert Mosby, June 17, 2024, pp. 17-18, bold added.)

We find no supplemental report from PTP Dr. Staehle and no further deposition of Dr. Staehle in the record of this case.

IV. DISCUSSION

In order to prove a compensable psychiatric injury, "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, subd. (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 3 Cal.Comp.Cases 1356, 1360]; *Watts v. Workers' Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 684, 688 (writ den.).)

It is undisputed in this case that applicant met his burden under section 3208.3, subdivision (b)(1), to establish that "actual events of employment" were the "predominant cause" of his psychiatric CT injury. (See *Gothard*, *supra*, at *9, citing App. Exh. 17, QME Mosby report, July 3, 2017, p. 14 ["industrial stressors combined are more than 51% responsible" for "cumulative anxiety reaction to numerous events at his workplace"].) QME Dr. Mosby noted that applicant's PTP, Dr. Staehle, "who made an initial evaluation on 03/03/17 and is also a QME qualified evaluator" came to the same conclusion that applicant sustained a psychiatric CT injury predominantly caused by workplace events. (*Ibid*.)

If the threshold for a compensable psychiatric injury has been met under section 3208.3, subdivision (b), as it has been here, and the employer has asserted that at least one the actual events of employment was a good faith personnel action, the WCJ must determine whether section 3208.3, subdivision (h) bars applicant's claim. (See *Rolda*, *supra*, 66 Cal.Comp.Cases at p. 247.) Therefore, the issue presented here is whether defendant met its burden to establish that applicant's psychiatric CT injury is barred by the doctrine of "good faith personnel action" pursuant to section 3208.3, subdivision (h). (Lab. Code, § 3208.3, subd. (h) ["The burden of proof shall rest with the party asserting the issue."].)

Section 3208.3, subdivision (h) provides that "[n]o 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, subd. (h), bold added.) "Substantial cause" is statutorily defined as: "**at least 35 to 40 percent of the causation from all sources combined.**" (Lab. Code, § 3208.3, subd. (b)(3), bold added.) Thus, a multilevel analysis is required when an industrial psychiatric injury is alleged and the employer raises the affirmative defense of a lawful, nondiscriminatory, good faith personnel action. (*Rolda*, *supra*, 66 Cal.Comp.Cases 241.)

> 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.

(*Rolda*, *supra*, 66 Cal.Comp.Cases at p. 247, bold added.)

Here, the WCJ found that applicant sustained a psychiatric CT injury arising out of and in the course of employment caused by "mandated overtime, interactions with inmates and a February 6, 2017 incident with two sergeants." (F&O, Findings of Fact nos. 1, 5.) The WCJ found the February 6, 2017 meeting was a "good faith personnel action" and that the reporting of QME Dr. Mosby was "substantial and persuasive" evidence that the February 6, 2017 meeting "accounts for 55% of the causation of applicant's psychiatric injury." (*Id.* at Findings of Fact nos. 6-9.) In other words, the WCJ found that defendant met its burden to establish that a "lawful, nondiscriminatory, good faith personnel action" was the "substantial cause" of applicant's psychiatric CT injury.

In the Report, the WCJ clarified his approach, stating his belief that the only issue presented for determination was whether the court "should adopt the conclusions of Dr. Staehle that the incident account for 10% causation, or Dr. Mosby that it accounted for 55% of causation." (Report, p. 3.) The WCJ then adopted the *Rolda* analysis employed by this WCJ in the previously rescinded decision (see *Gothard*) which assumed that applicant sustained only one specific injury resulting from the February 6, 2017 meeting:

> There are two overlapping issues in the current case: first, was the meeting with the two sergeants a good faith personnel action, and if it was, how much did that incident account for causation of the applicant's injury. Put in even simpler terms, should the court adopt the conclusions of Dr. Staehle that the incident account for 10% causation, or Dr. Mosby that it accounted for 55% of causation.
>
> The court engaged in a *Rolda* analysis in the initial decision, and, as the facts surrounding the incident have not changed, the court adopted the same conclusion that it originally reached – that the incident with the sergeants was a personnel action and that it was undertaken in good faith. It does appear that both parties accept that the incident was a personnel action.
>
> Accordingly, the issue is really whether the incident with the sergeants accounted for 10% causation as opined by Dr. Staehle, or 55% causation as opined by Dr. Mosby. The court adopted Dr. Mosby's analysis for several reasons. First, Dr. Staehle did not produce a comprehensive report consistent with Board Rule 10682. Second, Dr. Staehle opines that applicant has a GAF score of 55% at work and 60% at home. (See Applicant's Exhibit 1, deposition transcript of Dr. Staehle dated 3/16/2018 at pg. 26 – 27). The court was concerned by the inconsistency. Third, Dr. Staehle did not review applicant's deposition testimony, nor the summary of the testimony offered by applicant and other witnesses at trial, nor the court's decision, nor the report and recommendation following Reconsideration. In fact, it also appears that Dr. Staehle did not review applicant's Kaiser records. As such, the court feels that Dr. Staehle's opinions are not based on review of all relevant records and are therefore not substantial medical evidence. Doctor Mosby's opinion may be based on fewer face to face meetings, but he had a more comprehensive picture of the evidence, including testimony given by the applicant and colleagues under oath.

(Report, pp. 3-4.)

We disagree with the WCJ that defendant met its burden to establish that a "good faith personnel action" was the "substantial cause" of applicant's psychiatric CT injury, despite being given another "bite of the apple" following the *Gothard* decision in April of 2022. Even assuming arguendo that the February 6, 2017 meeting was a "personnel action" convened and held in "good faith", the opinion of QME Dr. Mosby that the February 6, 2017 meeting accounted for 55% of applicant's psychiatric CT injury is simply not supported by substantial medical evidence. Regardless, the findings of the WCJ that the February 6, 2017 meeting was a "personnel action" convened and held in "good faith" is not supported by substantial evidence.

A. “Substantial Cause”

Following the April 2022 decision in *Gothard*, defendant had the opportunity to further develop the record to meet its burden of proof to establish that the February 6, 2017 meeting was a “good faith personnel action” and that it was the “substantial cause” of applicant’s psychiatric CT injury. Despite this opportunity, the medical record developed following *Gothard* creates more doubt as to the opinion of QME Dr. Mosby on the issue of “substantial cause” under section 3208.3, subdivision (h), than existed prior to our decision in *Gothard.* As a result, the WCJ’s decision to rely on Dr. Mosby’s opinion that the February 6, 2017 meeting was either “more than 51%” or 55% of the cause of applicant’s psychiatric CT injury and thus, the “substantial cause” of the injury pursuant to section 3208.3, subdivision (h), is not based on substantial medical evidence.

A decision of the Workers’ Compensation Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-81 [39 Cal.Comp.Cases 310].) To be considered substantial evidence, a medical opinion “must be predicated on reasonable medical probability.” (*E.L. Yeager Construction v. Workers’ Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen’s Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-17, 419 [33 Cal.Comp.Cases 660].) An opinion is not substantial evidence if it is based on “inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess.” (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).) A medical opinion is not substantial evidence if it “poses a mere legal conclusion” that “does not furnish a basis for a finding...” (*Granado v. Workmen’s Comp. App. Bd.* (1968) 69 Cal.2d 399, 407 [33 Cal.Comp.Cases 647], citing *Zemke v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 799 [33 Cal.Comp.Cases 358], superceded on other grounds.)

Here, QME Dr. Mosby testified in 2024 that the only basis for his opinion that the February 6, 2017 meeting was 55% of the cause of applicant’s psychiatric CT injury was applicant’s own *subjective and lay opinion* that but for that meeting, he would still be working for defendant. On the other hand, *Dr. Mosby also testified that applicant’s injury existed before the February 6, 2017 meeting* and had, indeed, been the result of ongoing on-the-job stress since at least 2014 due to mandatory overtime and stressful situations in his workplace. (Def. Exh. J, Zoom Deposition of Dr. Robert Mosby, June 17, 2024, pp. 8-9, 16, 20-21; Def. Exh. I, p. 1.) In fact, Dr. Mosby stated in his supplemental report that the February 6, 2017 meeting was merely an excuse for applicant to finally admit to an *existing* injury that had been building over time:

> Stress is cumulative and builds over time when someone continues to experience stressful work place situations day after day in the work place. **Of course, someone is going to say a specific event caused their injury because they have to site [*sic*] something that made them break so to speak. But in fact, the stress for Mr. Gothard was building over time and that is documented by his various visits to Kaiser for his stress and anxiety.**

(Def. Exh. I, *supra*, bold added.)

Of more significance, however, is that *Dr. Mosby admitted that he was guessing* when attributing 55% or "more than 51%" of the cause of applicant's injury to the February 6, 2017 injury, once again emphasizing that the February 6, 2017 meeting was the "straw that broke the camel's back" but that "the injury, the trauma, has been longstanding prior to that event...he was certainly stressed severely prior to that, yes":

> **And in instances like this, we're guessing.** And it's my opinion that people that have a cumulative trauma injury, usually there is some event that sets them off. **But the injury, the trauma, has been longstanding prior to that event.** So, certainly, the event with the two sergeants was the straw that broke the camel's back for Mr. Gothard. But **he was certainly stressed severely prior to that, yes**

(Def. Exh. J, Zoom Deposition of Dr. Robert Mosby, June 17, 2024, pp. 9-12, bold added.)

Consequently, Dr. Mosby consistently deferred in this matter to the opinion of the PTP, Dr. Staehle, on the question of whether the February 6, 2017 meeting was the "substantial cause" of applicant's injury in this case:

> **If it were me, if it was up to me to make the rules in situations like this, I would always go by the treating therapist, because I think the treating therapist has more contact with the injured worker than I do. I mean, my contact with Jason was the three and a half hours that we spent together.** So in that time that I spent with him, you know, he did say, "I think I would still be working there if the sergeants hadn't done that to me." So that said to me that that had a lot to do with it. However, when you're working with somebody on a weekly basis, he could have said that in the session, and the next week he could have come in and said, you know, "I thought about what I said last week, and I don't think that's true. I really think it's more like this." So I have to go by what I encounter with that person, not by what Dr. Staley encountered with him. <u>**But if there was a choice between me and her, I would go with her assignment**</u>

> **<u>of percentages, because I think she has more contact with him and more understanding of what's going on with him.</u>**
>
> . . .
>
> And it's difficult for me to say, because what I have to go through, in my opinion, as a QME, is I have to go by what happens in the session that I have with the injured worker. And so based upon my contact with him, I would say, yes. **Based on my contact with him and what he said to me, I think that 55 percent would be a reasonable amount to assign to the sergeants taking him in and doing what they did with him. However, as I said earlier, if I had a session with Jason the next week and he said, you know, "I thought about what I said. I don't know if that's really true" that could easily happen. <u>That's why I think a lot of credibility needs to go to what Dr. Staley [sic] said, because she's the one that had continuing care with him over a long period of time.</u> And when you work with people over months, you begin to realize that they're consistent about what they say or they're inconsistent about what they say. <u>And I'm sure that she got a different picture than I did based upon, one, having spent more time with him; and two, having heard the consistency or inconsistency of what he said to her that he felt was the causation of it.</u>**

(Def. Exh. J, Zoom Deposition of Dr. Robert Mosby, June 17, 2024, pp. 9-12, 17-18, all emphasis added.)

Dr. Mosby's deferral is not surprising given the uncertainty in his own opinion. In fact, the reasons he cites for his deferral to Dr. Staehle undermines the very foundation of his own opinion on the issue. In other words, Dr. Mosby inherently admits that his opinion on the question of "substantial causation" is based on conjecture and inadequate examination of the patient; therefore, his opinion cannot be relied on as substantial medical evidence. (*Escobedo*, *supra*; *Granado*, *supra*.)[4]

Therefore, the opinion of QME Dr. Mosby that the February 6, 2017 meeting was 55% of the cause of applicant's psychiatric CT injury is not substantial medical evidence. As a result, and regardless of whether the meeting was a "good faith personnel action" or not, defendant failed to meet its burden of proof to establish its affirmative defense under section 3208.3, subdivision (h).

[4] We note that although Dr. Mosby confirms that he reviewed PTP Dr. Staehle's reports and deposition (Def. Exh. J, Zoom Deposition of Dr. Robert Mosby, June 17, 2024, pp. 12, 18-19), and confirms that Dr. Staehle has the more credible and substantial opinion on this issue, Dr. Mosby repeatedly states that for some reason, he believed he was unable to formally rely on that opinion. (See Def. Exh. J, Zoom Deposition of Dr. Robert Mosby, June 17, 2024, pp. 9-12, 17-18.)

As a result, we grant reconsideration and as our decision after reconsideration, we rescind Findings of Fact numbers 4 through 9 and the "take nothing" order of the WCJ's decision and issue a new finding of fact that defendant failed to meet its burden of proof to establish its affirmative defense under section 3208.3, subdivision (h).

B. Personnel Action

We are also not convinced by the WCJ's conclusion that the February 6, 2017 incident with two sergeants was a "personnel action" sufficient to trigger the "good faith personnel action" defense:

> Next, assuming both that the threshold for compensable psychiatric injury has been met under Labor Code section 3208.3, subdivision (b), and the employer has asserted that the injury is nonetheless barred as having resulted from a personnel action as defined by subdivision (h), **the WCJ must then decide whether any of the actual events of employment were personnel actions**, and if so, whether any of them were lawful, nondiscriminatory, good faith personnel actions. These are factual/legal issues for the WCJ to determine.

(*Rolda*, *supra*, 66 Cal.Comp.Cases at p. 246, bold added.)

Whether or not an "actual event of employment" is a personnel action "depends on the subject matter and factual setting for each case." (*County of Sacramento v. Workers' Comp. Appeals Bd. (Brooks)* (2013) 215 Cal.App.4th 785, 791 [78 Cal.Comp.Cases 379], bold added.)

> A personnel action has been defined as conduct attributable to management in managing its business, including such things as reviewing, criticizing, demoting, transferring, or disciplining an employee. (*Larch v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831, 833–839; *Stockman v. State of California/Department of Corrections* (1998) 63 Cal.Comp.Cases 1042, 1044–1047.) . . . "It is unnecessary, moreover, that a personnel action have a direct or immediate effect on the employment status. Criticism or action authorized by management may be the initial step or a preliminary form of discipline intended to correct unacceptable, inappropriate conduct of an employee. The initial action may serve as the basis for subsequent or progressive discipline, and ultimately termination of the employment, if the inappropriate conduct is not corrected." (*Id*. at pp. 834–835.)

(*Brooks*, *supra*, 215 Cal.App.4th at p. 790-791.)

Here, the WCJ accepted that the February 6, 2017 meeting was a "personnel action" because it was convened by applicant's superior, Sergeant Jiminez, who then labeled it a "verbal counseling" at trial:

During his shift, deputy Gothard failed to adequately document the transfer of a prisoner due to a schizophrenic episode. The mental health sergeant, Sergeant Pitkin, asked deputy Gothard, via email, to provide documentation in the future. In responding to this email, deputy Gothard characterized his conversation with Sergeant Jimenez as him being "chewed out" on the phone for attempting to call in sick. Sergeant Jimenez became aware of this characterization and took issue with it.

Prior to the meeting in question, Sergeant Jimenez approached Lieutenant Toby and asked for advice regarding how best to address the situation. Lieutenant Toby recommended that a meeting take place, with a third-party present.
. . .

The cause of the injury arose from a personnel action, to wit, the "verbal counseling session." It is clear to the undersigned that the purpose of the meeting was to inform Deputy Gothard that his use of the phrase "chewed out" in reference to his calling in sick, was not appreciated by Sergeant Jimenez.

A meeting to discuss the email took place on February 6, 2017. The meeting was described by Sergeant Jimenez as a "verbal counseling." (See MOH pg. 14:25 – 36). The meeting was attended by Sergeant Jimenez, Sergeant McLeod, and Deputy Gothard. Details regarding the specifics of the meeting are disputed, however, deputy Gothard was not disciplined, and in the course of the meeting no voices were raised, and no threats were made. (See, e.g. MOH pg. 10:31 – 32; MOH pg. 15:22 – 24).

. . .

The applicant argues that the counseling session was not lawful because it violated the "Police Officers Bill of Rights" as described in California government code § 3303. That statute requires that "when any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the following conditions." Among the conditions is that under certain circumstances, the officer may have a representative (often a union representative) present.

In the present case, the undersigned finds [credible] the testimony of Sergeant Jimenez that the counseling session was not an "interrogation" as that term is used in Cal. Govt Code § 3303(a). There was no investigation; the evidence shows that the counseling session was held for the purpose of admonishing deputy Gothard for his use of intemperate language. Moreover, this court finds credible the testimony that the counseling session did not contemplate the imposition of any disciplinary action.

(F&O, Opinion on Decision, pp. 2-3, all emphasis added.)

However, *given the subject matter and factual setting of this case,* we find that the stronger inference from the evidenceis that the February 6, 2017 meeting was not a "personnel action" taken against applicant to assist defendant in the management of its business or as a first step toward future disciplinary action.[5] Instead, it was a private meeting organized by Sergeant Jiminez, applicant's supervisor, *after applicant reported him* to another supervisor for his own alleged intemperate conduct:

> He did recall e-mails between Deputy Gothard and Sergeant Pitkin . He received a copy of Sergeant Pitkin's e-mail that was forwarded to him ... He found Deputy Gothard's characterization of the conversation disrespectful because he doesn't "chew people out" for calling in sick.
> . . .
>
> He characterized the meeting as a verbal counseling, and no discipline was contemplated.
> . . .
>
> But as no discipline was contemplated, no union representative was required.
> . . .
>
> He requested Sergeant MacLeod sit in on the meeting. He held the meeting in the FTO office because it was private.
> . . .
>
> In the course of the meeting, he told Deputy Gothard he believed that the language used in the e-mail was inappropriate.
> . . .
>
> He did not believe that in the e-mail to Sergeant Pitkin that Deputy Gothard was alleging a violation of sick leave policy. He believed that it was a misunderstanding on Deputy Gothard's part that he was "chewed out."

(2018 MOH, pp. 13-16.)

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[5] Even assuming arguendo that another inference might be considered reasonable based on the evidence, no Appeals Board decision may be annulled because it chose one of two competing inferences reasonably drawn from the evidence, "both of which are reasonable, the one sustaining and the other opposing the right to compensation." (*State Employees' Retirement System v. Industrial Acci. Com*. (1950) 97 Cal.App.2d 380, 382–383.) "The [Appeals Board] is...the body charged with the determination of issues of fact, and its findings of fact are not reviewable where they find support under any rational view of the evidence." (*North Pacific S.S. Co. v. Industrial Acci. Com*. (1917) 174 Cal. 500, 502; see *Gage v. Workers' Comp. Appeals Bd.* (2016) 6 Cal.App.5th 1128, 1135 citing *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233.)

Although Sergeant Jiminez claims to have approached his superior officer, Lieutenant Toby, to ask him how he should deal with applicant's reporting him to another supervisor, Lieutenant Toby "did not direct Sergeant Jiminez or Sergeant MacLeod to have a discussion with Deputy Gothard. He did not recall telling Sergeant Jimenez to take another person with him..." (2018 MOH, p. 12.)[6] Lieutenant Toby also did not tell either Sergeant to "write up" the meeting. (*Ibid.*)

After the meeting, Sergeant Jiminez went ahead and wrote up a lengthy memo *to Lieutenant Toby* wherein he explained that the purpose of the meeting had been to explain to applicant that "if he felt I treated him poorly, **I would have preferred that he would have talked to me about it to clear up any misunderstandings before he emailed another supervisor.**" (Def. Exh. E, pp. 3-4.) "The tone of this meeting was conversational. I did not reprimand Gothard and that was not the intention of the meeting. The intent was to clarify any misunderstanding between myself and Gothard. I also wanted to make sure Gothard understood the expectations for calling in sick and that if he had an issues he could come to me and talk about it." (*Ibid.*) The memo was not addressed to applicant, applicant's personnel record, or human resources. (*Ibid.*) The memo was never placed in applicant's personnel record. (See App. Exh. 26, Applicant's Personnel Record.)[7]

Consequently, a reasonable inference can be drawn that the true purpose of the meeting and the follow-up memo to his own superior officer, was Sergeant Jiminez' need to vent his feelings and to justify his own actions to his superior officer after applicant reported him to another supervisor. Therefore, while most certainly an "event of employment," *given the subject matter and factual setting of this case,* defendant did not meet its burden to establish that the February 6, 2017 meeting was a "personnel action."

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[6] We note that the direct examination of Lieutenant Toby was conducted by applicant's counsel and that on cross-examination by defendant's counsel, the witness testified that the use of "chewed out" warranted a verbal counseling session and felt that the meeting was appropriate in this specific case. (2018 MOH, p. 13.) However, this testimony is not credible or persuasive given that ***at the time of the February 6, 2017 meeting***, Lieutenant Toby was already aware of applicant's email, was approached about it by Sergeant Jiminez, but did *not* direct his sergeants to take *any* action. (*Id*., at pp. 12-13.)

[7] Sergeant Jimenez asked another sergeant to sit it on the private meeting and he also wrote up a memo to Lieutenant Toby alone. (Def. Exh. F.) Sergeant MacLeod stated that the meeting "served the purpose of allowing Sergeant Jimenez and Deputy Gothard to clear the air about any feeling he (Gothard had) and reestablish good lines of communication." (*Ibid.*, p. 3.) Given that the meeting was instigated solely by Sergeant Jiminez because of his feelings toward Gothard after being reported by Gothard, we do not give much weight to the parenthetical attribution that the meeting was for the benefit of *applicant's* feelings.

B. "Good Faith" Personnel Action

Even assuming arguendo that the February 6, 2017 meeting was a "personnel action," we do not believe that defendant could establish it was taken in good faith. The Legislature expressly assigned the burden of proof to defendant to establish the "good faith personnel action" defense in section 3208.3(h); however, 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.)

Given that we do not agree that the February 6, 2017 meeting was a "personnel action," the issue of whether that meeting was held in good faith does not arise in this matter. However, assuming arguendo the meeting was a "personnel action," we do not believe that it to be reasonable that an employee would be subject to a "personnel action" for using the phrase "chewed out." This phrase is not objectively disrespectful, provocative or offensive. In fact, applicant testified that by "chewed out" he meant that he felt pressured to come to work despite not feeling well enough to come to work. (2018 MOH, p. 10.) Of more concern is that the February 6, 2017 meeting was instigated, organized, and lead by Sergeant Jimenez, the supervisor that applicant *reported* for allegedly having "chewed out" applicant when he attempted to call in sick for work. Further, Sergeant Jiminez held the meeting even though Lieutenant Todd, his own superior officer, knew of the "chewed out" language used by applicant but did not direct him to conduct any form of "personnel action" as a result or consequence. The post-meeting memos were directed to Lieutenant Todd alone, and not to applicant, his personnel file, or human resources.

Looking at the totality of the factual circumstances in this case, there is another reasonable inference that can be drawn from the evidence than that landed on by the WCJ, who accepted the credibility of Sergeant Jiminez' testimony that the meeting was a "verbal counseling" taken for applicant's use of "intemperate" language and *therefore*, that the meeting was taken in good faith. Indeed, we believe the stronger inference is that Sergeant Jiminez' characterization of the meeting as any form of "personnel action" against applicant was self-serving. Sergeant Jiminez organized the February 6, 2017 meeting because he "took issue" with *being reported* to another supervisor for his own alleged intemperate conduct and wanted to ensure no one (i.e., his superior office, Lieutenant Todd) "misunderstood" the situation.[8]

In addition, the WCJ's decision was based on the testimony of Sergeant Jiminez without weighing the testimony from Lieutenant Todd or applicant, and/or the discrepancy between Sergeant Jiminez' testimony and Sergeant Todd's testimony. Although the WCJ found Sergeant Jiminez to be a credible witness, it is also true that applicant was found by QME Dr. Mosby, a psychiatrist, to be "a credible patient who was frank, open, and truthful." (*Gothard*, *supra*, at *11 citing App. Exh. 17, pp. 10-11 and App. Exh. 16, p. 13.) Moreover, the WCJ made no finding that either applicant or Lieutenant Todd lacked credibility.

[8] This form of shifting blame, denying another's memories, or diverting attention especially by someone in a position of power might be colloquially referred to as "projection" or "gaslighting."

Therefore, even assuming arguendo that we agreed that the February 6, 2017 meeting was a "personnel action," we cannot agree that the meeting was convened with "a sincere purpose" or without an intent to distract and mislead through manipulation and/or abuse of position. In other words, defendant failed to establish that any such "personnel action" was taken in "good faith."

Accordingly, the WCJ's determination that defendant met its burden of proof to establish that applicant's claim for psychiatric CT injury is barred by the "good faith personnel defense" (Lab. Code, § 3208.3, subd. (h)) is not based on substantial evidence. We therefore grant reconsideration and as our decision after reconsideration, we rescind Findings of Fact numbers 4 through 9 and the "take nothing" order of the WCJ's decision and issue a new finding of fact that defendant failed to meet its burden of proof to establish its affirmative defense under section 3208.3, subdivision (h).

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued on April 23, 2026 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on April 23, 2026 by a workers' compensation administrative law judge is **AFFIRMED** except that it is **AMENDED** as follows:

. . .

FINDINGS OF FACT

> . . .
> 4. Actual events of employment were predominant as to all causes combined of applicant's cumulative trauma injury to his psyche (Lab. Code, § 3208.3, subd. (b)(1)), and included mandatory overtime and stressful situations on a day to day basis including incidents with inmates during his tenure as a correctional officer, and a February 6, 2017 meeting with two sergeants.
> 5. The opinion of Panel Qualified Medical Evaluator Robert Mosby, Ph.D., as to the percentage of causation of applicant's psychiatric injury attributable to the February 6, 2017 meeting with two sergeants is not substantial medical evidence.
> 6. Given the subject matter and factual setting of this case, the February 6, 2017 meeting with two sergeants was not a "personnel action" taken against applicant.
> 7. Given the totality of the circumstances in this case, the February 6, 2017 meeting with two sergeants was not held in "good faith."
> 8. Defendant failed to meet its burden of proof to establish that applicant's cumulative trauma injury to his psyche is barred by the doctrine of "good faith personnel action" pursuant to section 3208.3, subdivision (h). (Lab. Code, § 3208.3, subd. (h) ["The burden of proof shall rest with the party asserting the issue."].)

ORDER

Applicant's claim for cumulative trauma injury to his psyche in ADJ10788304 is **not barred** by Labor Code section 3208.3, subdivision (h).

WORKERS' COMPENSATION APPEALS BOARD

/s/ **JOSEPH V. CAPURRO, COMMISSIONER**

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 29, 2026

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

JASON GOTHARD
LAURA ROSENTHAL LAW, P.C.
MULLEN & FILIPPI, LLP

AJF/md

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