WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KATHY ROBINSON, ***Applicant***

vs.

BERKELEY UNIFIED SCHOOL DISTRICT, PERMISSIBLY SELF-INSURED, ADMINISTERED BY INTERCARE HOLDINGS INSURANCE SERVICES, INC., ***Defendants***

Adjudication Number: ADJ9425810
Oakland District Office

NOTICE OF INTENTION TO SUBMIT FOR DECISION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having considered the matter, we now provide Notice of our Intention to set aside the decision of the workers' compensation administrative law judge (WCJ) and to enter new findings of fact, as set forth below.

Applicant seeks reconsideration of the May 31, 2022 Findings and Order (F&O), wherein the WCJ found that applicant, while employed as a teacher on January 3, 2012, did not sustain industrial injury to her psyche.

Applicant contends that she has sustained injury to her psyche arising out of occupational exposures, and that her case has been the subject of protracted and unnecessary litigation.

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, as our Decision After Reconsideration we intend to exercise our authority under Labor Code[1] section 5803 to correct an error of law, as follows:

1. Set aside the May 31, 2022 Findings and Order;

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

2. Substitute a new Findings of Fact that applicant sustained injury arising out of and in the course of her employment and that compensation for applicant's psychiatric injury is not barred under Labor Code section 3208.3(h).

In order to provide the parties the opportunity to address the issues raised by our proposed holdings, we issue a notice of intention (NIT) to allow the parties twenty (20) days in which to respond.

BACKGROUND

Applicant claimed injury to her thyroid and psyche while employed as a teacher by defendant Berkeley Unified School District (defendant) on January 3, 2012. Defendant denied liability for the claim.

The parties selected Boukje Eerkens, Psy.D., as the Qualified Medical Evaluator (QME) in psychology.

On September 20, 2016, the parties proceeded to trial, framing for decision the issue of whether applicant sustained injury arising out of and in the course of employment (AOE/COE). Defendant asserted that any compensation for psychiatric injury was barred by the "good-faith personnel action" defense of section 3208.3(h). Following the admission of significant documentary evidence into the record, the WCJ ordered the matter continued for testimony. (Minutes of Hearing, dated September 20, 2016, at p. 1:34.)

On December 13, 2016, the WCJ heard testimony from applicant and ordered the matter continued. (Minutes of Hearing and Summary of Evidence, dated December 13, 2016, at p. 1:37.)

Trial proceedings resumed on November 7, 2017, at which time the WCJ described an intervening procedural history that included a defense request to vacate the order closing discovery and motion for development of the record, which was granted by the court on March 3, 2017. (Minutes of Hearing and Summary of Evidence, dated November 7, 2017.) The parties requested and obtained supplemental reporting from QME Dr. Eerkens, and the WCJ ordered the reporting admitted into evidence. The WCJ heard additional testimony from applicant and ordered the matter continued. (*Id.* at p. 1:42.)

On April 17, 2018, the WCJ heard additional testimony from applicant under cross-examination. Defendant questioned applicant regarding whether she had filed a prior workers'

compensation claim corresponding to a date of injury of ending June 14, 1988, at which time applicant refused to answer. Defendant moved for case dismissal based on applicant's refusal to respond to questioning, and the WCJ ordered the matter continued.

On June 1, 2018, the WCJ heard additional testimony from applicant with respect to the alleged prior claim for workers' compensation benefits.

On July 20, 2018, the WCJ issued a Findings and Order, determining that applicant had not met her burden of proof in establishing injury to her psyche or thyroid. (Findings and Order of Dismissal dated July 20, 2018, Findings of Fact Nos. 1 & 2.) The WCJ's Opinion on Decision noted that applicant's refusal to respond to trial questions and "subsequent attempts to evade have cast irreparable doubt on applicant's credibility and the veracity of the [medical-legal] reports." (Opinion on Decision, dated July 20, 2021, at p. 6.)

On August 3, 2018, applicant filed a Petition for Reconsideration.

On September 18, 2018, we granted applicant's petition to further study the factual and legal issues presented.

On April 27, 2020, we issued our Opinion and Decision After Reconsideration. We concluded that while "applicant has no legal basis for refusing to answer defendant's questions, that is a factor to be considered by the WCJ in reaching her decision on the merits," and that "by considering all of the evidence, including applicant's testimony and/or lack thereof, the WCJ will protect both parties' due process rights." (Opinion and Decision After Reconsideration, dated April 27, 2020, at p. 3:21.) Accordingly, we rescinded the July 20, 2018 Findings and Order and returned the matter to the trial level for further proceedings.

On April 6, 2021, the WCJ conducted additional trial proceedings, and heard testimony from applicant and from defense witness Zachary Pless. The WCJ ordered the matter submitted for decision the same day. (Minutes of Hearing and Summary of Evidence Day 6, dated April 6, 2021, at p. 1:43.)

On June 9, 2021, the WCJ issued her Findings and Orders, determining that applicant "has not met her burden of proof for injury arising out of and occurring in the course of employment for psychiatric injury pursuant to Labor Code section 3208.3." (Findings and Order, dated June 9, 2021, Finding of Fact No. 1.) The WCJ also determined that "[b]ased on the reporting by QME Dr. Lessenger, Applicant did not sustain injury arising out of and occurring in the course of employment to her neck/goiter or thyroid." (Finding of Fact No. 2.) The WCJ's Opinion on

Decision explained, in relevant part, that QME Dr. Eerkens had apportioned 40 percent of applicant's present psychiatric disability to nonindustrial factors. Of the remaining 60 percent, the QME identified four discrete factors of causation, each responsible for 15 percent of applicant's present disability. (Opinion on Decision, dated June 9, 2021, at pp. 8-10.) The WCJ determined that one of the four factors, a "supervisor reprimand of 09-27-2013" constituted lawful, nondiscriminatory good-faith personnel action under section 3208.3(h). (*Id.* at p. 10.) The WCJ concluded that the addition of the 40 percent nonindustrial causation and the 15 percent attributable to good-faith personnel action meant that 65 percent of applicant's disability was non-industrial. Because applicant had not met the predominant cause requirement of section 3208.3(b)(1), applicant's claim for psychiatric injury was not compensable. (*Id.* at p. 11.)

On June 22, 2021, applicant filed a Petition for Reconsideration, averring she was not aware of the May 23, 2017 supplemental reporting of the QME upon which the WCJ had relied. (Petition for Reconsideration, at p. 3.)

On July 7, 2021, defendant filed its answer, averring applicant had not met the burden of proof necessary to sustain a claim of psychiatric injury. (Answer, at p. 4:24.)

On July 19, 2021, the WCJ issued her Report and Recommendation on Petition for Reconsideration, concluding that "[w]ith 40% of the disability attributed to non-industrial factors, and 15% attributed to the good faith personnel action, applicant has not met her burden to prove predominant cause under Labor Code section 3208.3." (Report, at p. 8.)

On August 23, 2021, we granted applicant's Petition to further study the legal and factual matters presented.

On January 14, 2022, we issued our Opinion and Decision After Reconsideration. We explained that the question of whether compensation was barred under section 3208.3(h) required a multi-step analysis as set forth in *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241, 245-247 (Appeals Board en banc). The initial inquiry required under section 3208.3(b) was whether actual events of employment were involved. The second step was to evaluate whether the actual events of employment were the predominant cause of the psychiatric injury. The third step would be a determination of whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory, and in good-faith. The final step of the analysis required a determination of whether any of the qualifying good-faith personnel actions were a substantial cause (i.e., 35 to 40 percent) of the psychiatric disability. (Opinion and Decision After

Reconsideration, dated January 14, 2022, at pp. 4-6.) We noted that the WCJ's conclusions were analytically incomplete, as the WCJ analyzed only one of the four factors of industrial causation that might fall under the rubric of personnel action. We observed that the QME had ascribed 60 percent causation to actual events of employment, compromised of four factors/events, each causing 15 percent of the injury. We wrote:

> If three of the factors were good faith personnel actions, then 45% of applicant's disability would have been caused by those actions and the claim would be barred pursuant to section 3208.3(h). If only one or two of the factors were good faith personnel actions, the claim would not be barred. However, after reviewing the entire trial record, it appears to be necessary that we return the matter to the WCJ to conduct the four-step analysis described in *Rolda*, supra, and to conduct further proceedings as appropriate.

(Opinion and Decision After Reconsideration, dated January 14, 2022, at p. 7.)

We did not disturb the WCJ's determination that applicant's thyroid condition was not industrial, but we amended the WCJ's decision to defer the issue of whether applicant's claim for psychiatric injury was compensable and returned the matter to the trial level for further proceedings. (*Ibid*.)

On January 18, 2022, the WCJ issued an Order for Briefing, directing the parties to submit post-trial briefing addressing the issues raised in our Opinion and Decision After Reconsideration. (Order for Briefing, dated January 18, 2022, at p. 2.)

On May 31, 2022, the WCJ issued the instant F&O. Therein, the WCJ determined that applicant did not sustain psychiatric injury, and that applicant did not meet her burden of proof under section 3208.3. (Finding of Fact Nos. 1 & 2.) The WCJ again reiterated the analysis that the addition of the 40 percent nonindustrial causation with any one of the four factors of 15 percent industrial causation would exceed the predominance threshold, resulting in the mathematical impossibility of applicant's industrial causation being predominant. (*Id.* at p. 5.) However, pursuant to our January 14, 2022 Opinion and Decision after Reconsideration, the WCJ analyzed each of the four factors of industrial causation and found that all of the "reactions taken by the employer intending to help applicant were lawful, nondiscriminatory, and good faith actions." (Opinion on Decision, at p. 15.)

Applicant's Petition contends that she has sustained injury to her psyche arising out of occupational exposures, and that her case has been the subject of protracted and unnecessary litigation.

Defendant's Answer contends applicant's Petition was untimely, skeletal and "legally deficient." (Answer, at p. 4:8.) The WCJ's Report similarly observes that applicant's pleading is untimely and "legally deficient." (Report, at p. 7.) On December 22, 2022, we granted applicant's Petition to further study the legal and factual issues in the case.

DISCUSSION

I.

Former section 5909 provided that a petition is denied by operation of law if the Appeals Board does not act on the petition within 60 days after it is filed. However, unlike the Court of Appeal, which has the right to summarily deny petitions for writ of review and mandate, the Appeals Board does not deny petitions for reconsideration by operation of law pursuant to section 5909. This is based on the Supreme Court's holdings that summary denial of reconsideration is no longer sufficient after the enactment of section 5908.5. (*Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16] ["We hold that if the appeals board denies a petition for reconsideration its order may incorporate and include within it the report of the referee, provided that the referee's report states the evidence relied upon and specifies in detail the reasons for the decision."]; *Moyer v. Workmen's Comp. Appeals Bd*. (1972) 24 Cal.App.3d 650, 655 [37 Cal.Comp.Cases 219]; *Hodges v. Workers' Comp. Appeals Bd*. (1978) 82 Cal.App.3d 894, 906 [43 Cal.Comp.Cases 870; *Painter v. Workers' Comp. Appeals Bd*. (1985) 166 Cal.App.3d 264, 268.)

Timely petitions for reconsideration filed and *received by* the Appeals Board are acted upon within 60 days from the date of filing pursuant to section 5909, by either granting, dismissing, or denying the petition. Thereafter, once a decision on the merits of the petition issues, the parties can then determine whether to seek review under section 5950. (See Lab. Code, § 5901.)

An exception occurs when a petition is <u>not</u> *received by* the Appeals Board within 60 days due to irregularities outside the petitioner's control. In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied applicant's

petition for reconsideration because it had not acted on the petition within the statutory time limits of section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Ibid.*) Pursuant to the holding in *Shipley* allowing tolling of the 60-day time period in section 5909, the Appeals Board acts to grant, dismiss, or deny such petitions for reconsideration within 60 days of receipt of the petition, and thereafter issues a decision on the merits.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635, fn. 22 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].)

If a timely filed petition is never acted upon and considered by the Appeals Board because it is "deemed denied" due to an administrative irregularity and not through the fault of the parties, the petitioning party is deprived of their right to a decision on the merits of the petition. (Lab. Code, §5908.5; see *Evans, supra,* 68 Cal.2d at pp. 754-755; *LeVesque, supra,* 1 Cal.3d at p. 635.) Just as significantly, the parties' ability to seek meaningful appellate review is compromised, raising issues of due process. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra,* 68 Cal.2d 753; see also *Rea, supra,* 127 Cal.App.4th at p. 643.) *Rea* and other California appellate courts[5] have consistently followed the *Shipley* court's lead when weighing the statutory mandate of 60 days against the parties' constitutional due process right to a true and complete judicial review by the Appeals Board.

As the California Supreme Court stated in *Elkins v. Derby (1974) 12 Cal.3d 410, 420 [39 Cal.Comp.Cases 624]*:

> ***Procedural rules should engender smooth and functional adjudication.*** A procedural practice is neither sacred nor immutable. It must be able to withstand the charge that it is inequitable, burdensome or dysfunctional. We think duplicative filing succumbs to all three charges. We also believe that ***respect for***

> ***our legal system -- a respect which is absolutely essential to its effective functioning -- is hardly enhanced by an incongruent procedural structure*** which causes an injured party simultaneously to allege before different tribunals propositions which are mutually inconsistent. Absent a tolling rule, this is precisely the strategy to which a party unsure of his remedy must resort in order to protect his right to recovery. (Italics and bolding added.)

(*Elkins, supra,* 12 Cal.3d at p. 420.)

"[I]t is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley, supra,* 7 Cal.App.4th at p. 1108.) The California Constitution mandates that the WCAB "accomplish substantial justice in all cases. . . ." (Cal. Const., art XIV, § 4; Lab. Code, § 3201.) ***In keeping with the WCAB's constitutional and statutory mandate, all litigants before the WCAB must be able to rely on precedential authority, and all litigants must have the expectation that they will be treated equitably on issues of procedure and be accorded same or similar access to the WCAB.*** The Appeals Board has relied on the *Shipley* precedent for over thirty years, by continuing to consider all timely filed petitions for reconsideration on the merits, consistent with due process. Treating all petitions for reconsideration in the same or similar way procedurally promotes judicial stability, consistency, and predictability and safeguards due process for all litigants. We also observe that a decision on the merits of the petition protects every litigant's right to seek meaningful appellate review after receiving a final decision from the Appeals Board.

In this case, applicant filed her Petition for Reconsideration on July 5, 2022 at the Oakland district office. As required by Rule 10205.4 (Cal. Code Regs., tit. 8, § 10205.4), applicant's paper Petition was thereafter scanned into the Electronic Adjudication Management System (EAMS). (See Cal. Code Regs., tit. 8, §10206 [electronic document filing rules], § 10205.11 [manner of filing of documents].) The Division of Workers' Compensation (DWC) is headed by the Administrative Director, who administers all 24 district offices with more than 190 WCJs, is responsible for maintenance of EAMS and is the custodian of all adjudication files. (See Cal. Code Regs., tit. 8, §§10205, 10205.4, 10206, 10208.5, 10208.7; see also Lab. Code §§ 110, 111 [delineating the powers of the Administrative Director and Appeals Board].) When a petition is filed, a task is sent to the WCJ through EAMS so that the WCJ receives notice that a Report is required. (See Cal. Code Regs., tit. 8, §10206; 10962.) No such notice is provided to the Appeals

Board. Thereafter, the district office electronically transmits the case to the Appeals Board through EAMS and notifies the Appeals Board that it has been transmitted.

Here, according to Events in EAMS, which functions as the "docket," the district office transmitted the case to the Appeals Board on October 21, 2022. Thus, the first notice to the Appeals Board of the Petition was on October 21, 2022. The WCJ issued the Report on November 4, 2022. Due to this lack of notice by the district office, the Appeals Board failed to act on the Petition within 60 days, through no fault of the parties. Therefore, considering that applicant filed a timely Petition for Reconsideration and that the Appeals Board's failure to act on that Petition was a result of administrative error, we conclude that our time to act on applicant's Petition was tolled until 60 days after October 21, 2022.

II.

There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (§§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(b).) Pursuant to section 5911, an aggrieved party may seek reconsideration of an Appeals Board decision within the same time limits or file a petition for writ of review under section 5950, et seq.

We acknowledge that the time limit to file a petition for reconsideration is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v. Workers' Comp. Appeals Bd*. (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].) Here, the WCJ issued the decision on May 31, 2022, and applicant filed her Petition for Reconsideration 37 days later on July 7, 2022, rendering it untimely.

However, the issue before us concerns the WCAB's ability to correct a legal error by the WCJ.

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Furthermore, decisions of the Appeals Board must be supported by substantial evidence. (§§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) 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 or a Workers' Compensation Judge may correct a clerical error at any time and without necessity for further hearings, notwithstanding the lapse of the statutory period for filing a petition for reconsideration." (*Toccalino v. Workers' Comp. Appeals Bd*. (1982) 128 Cal.App.3d 543, 558, internal citation omitted.)

We emphasize that when the Appeals Board grants reconsideration, it has the power to address all issues, including those not previously raised. In *Pasquotto v. Hayward Lumber (2006) 71 Cal.Comp.Cases 223, 229*, fn. 7 (Appeals Board en banc), we noted that once reconsideration has been granted, the Appeals Board has the power under sections 5906 and 5908 to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (Citing *Great Western Power Co. v. Industrial Acc. Com.* (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]; *State Comp. Ins. Fund v. Industrial Acc. Com.* (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases. 98]; *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657, 663 [18 Cal.Comp.Cases 246]; *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (*Sowell*) (1943) 58 Cal.App.2d 262, 266–267 [8 Cal.Comp.Cases 79].)

Additionally, the Appeals Board maintains jurisdiction over all of its awards and may issue appropriate orders modifying said awards upon a showing of good cause. (§ 5803.) Good cause to reopen exists when the prior order was based on an error of law. (*Bartlett Hayward Co. v. Industrial Acc. Com*. (*Slate*) (1928) 203 Cal. 522, 532 (*Slate*); see also *Knowles v. Workmens' Comp. Appeals Bd*. (1970) 10 Cal.App.3d 1027, 1029 [35 Cal.Comp.Cases 411] (*Knowles*).)

Section 5803 provides:

> The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division, and the decisions

> and orders of the rehabilitation unit established under Section 139.5. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.
>
> This power includes the right to review, grant or regrant, diminish, increase, or terminate, within the limits prescribed by this division, any compensation awarded, upon the grounds that the disability of the person in whose favor the award was made has either recurred, increased, diminished, or terminated.

(Lab. Code, § 5803.)

The Court of Appeal has noted that "[t]he process of the reopening of the case is not identical with the process of reconsideration," and that the exercise of the Board's authority under section 5803 requires that "[t]he interested party [be] given notice and opportunity to be heard, and one of the issues upon which he is to be heard is whether or not 'good cause' justifies the reopening." (*United States Pipe & Foundry Co. v. Indus. Acc. Comm.* (*Hinojoza*) (1962) 201 Cal.App.2d 545 [27 Cal.Comp.Cases 73] (*Hinojoza)*.)

Here, we have carefully reviewed the entire record, as occasioned by applicant's Petition challenging the WCJ's take nothing order. From our review, we have identified an error of law in the WCJ's analysis of compensability with respect to applicant's claim for psychiatric injury, which we will discuss, *infra*. Because "good cause to reopen exists when the prior order was based on an error of law," we believe the exercise of our jurisdiction in this matter under section 5803 is warranted and appropriate. (*Martinez v. Friendly Franchisees Corp.*, 2015 Cal. Wrk. Comp. P.D. LEXIS 358; *Slate*, *supra*, 203 Cal. 522, 532; see also *Knowles, supra,* 10 Cal. App. 3d 1027, 1029 [35 Cal.Comp.Cases 411]; *Industrial Indem. Co. v. Industrial Acci. Comm.* (*Robison*) 22 Cal.Comp.Cases 63 [1957 Cal. Wrk. Comp. LEXIS 110] (writ den.).)

Based on our review of the record, we preliminarily conclude that applicant has met her burden of establishing her psychiatric injury was predominantly caused by actual events of employment, and that compensation is not barred by section 3208.3(h). In order to comply with the due process concerns addressed in *Hinojoza,* supra, 201 Cal.App.2d 545, we are providing notice to the parties of our intention to set aside the May 31, 2022 Findings and Order and to substitute new Finding of Fact that applicant sustained injury to her psyche, and that compensation for applicant's claim of psychiatric injury is not barred by section 3208.3(h). We believe this action is necessary under our obligation to achieve substantial justice, and that the exercise of our

jurisdiction under section 5803 is appropriate to correct a clear error of law. (*Hinojoza, supra*, 201 Cal.App.2d 545; *Slate*, *supra*, 203 Cal. 522, 532; *Knowles*, *supra*, 10 Cal.App.3d 1027, 1029; *Martinez v. Friendly Franchisees Corp.* (June 12, 2015, ADJ9085589) [2015 Cal. Wrk. Comp. P.D. LEXIS 358].)

III.

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

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

(Lab. Code, § 3208.3(h).)

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

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

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

(*Id.* at p. 247.)

Here, QME Dr. Eerkens evaluated applicant and opined that 40 percent of applicant's disability was caused by her nonindustrial personality features. (Ex. R, Report of Boukje Eerkens, Psy.D., dated May 23, 2017, at p. 2.) The remaining 60 percent of applicant's disability is attributable to "cumulative work events," divided equally as follows: (1) the supervisor reprimand of September 27, 2013 (15 percent); (2) applicant's experience of supervisor neglect during the physical intimidation and bullying on the part of the parents of the children she cares for (15 percent); (3) applicant's supervisor allowing parents to vent and scream at her during 2013 meeting (15 percent); and (4) excessive workload with a coworker who could not assist properly due to lack of mobility (15 percent). (*Id.* at pp. 2-3.) The four actual events of employment sum to 60 percent industrial causation.

The WCJ's June 9, 2021 Findings and Order determined that applicant had not met the burden of proof for injury arising out of and occurring in the course of employment for psychiatric injury pursuant to Labor Code section 3208.3. The WCJ acknowledged the QME's opinion that 60 percent of applicant's disability arose out of actual events of employment, and thus met the requirements for predominance under section 3208.3(b). (Opinion on Decision, dated June 9, 2021, at p. 8.)

The WCJ then analyzed whether any of the actual events of employment identified by the QME qualified as lawful, nondiscriminatory and good faith personnel actions. The WCJ determined that the first actual event of employment, the "supervisor reprimand" of September 27, 2013, constituted lawful, nondiscriminatory good-faith personnel action for which "defendants are not liable." (*Id.* at p. 9.) The WCJ concluded:

> In sum, 40% of Applicant's psychiatric disability is apportioned to non-industrial personality features. Defendants are not liable for another 15% of Applicant's psychiatric condition due to the supervisor reprimand of 09-27-2013 which was taken in good faith. Added together, at least 65% [sic] of the psychiatric disability is non-industrial. Therefore, Applicant has not met the burden of showing that actual events of employment account for the predominant cause (i.e., 51% or more) of her psychiatric injury. No further analysis is needed; Applicant's claim for psychiatric injury must be denied in accord with the Labor Code.

(Opinion on Decision, dated June 9, 2021, at pp. 10-11.)

Following applicant's Petition for Reconsideration, we amended the WCJ's decision to defer the issue of whether applicant's claim is compensable and returned the matter to the trial level for further analysis and decision. We noted that because Dr. Eerkens had concluded that 60 percent of applicant's psychiatric disability was the result of actual events of employment, applicant had met the predominance requirements described at section 3208.3(b). (Opinion and Decision After Reconsideration, dated January 14, 2022 at p. 7.) We also noted that the question of whether applicant's claim was barred by the affirmative defense that it was substantially caused by lawful, nondiscriminatory and good-faith personnel action remained unresolved. This was because of the 60 percent industrial causation, compromised of four equal factors each causing 15 percent of applicant's present disability, the WCJ had only analyzed *one* of those factors. (*Ibid*.) That is, while we deferred to the WCJ to consider the issue of injury to psyche in the first instance so as to provide due process to the parties, it was clear that we concluded that there was substantial medical evidence to show that applicant met her burden to establish that she sustained an injury to psyche. We noted that in order to determine whether good-faith personnel action was a substantial cause of applicant's psychiatric injury, the WCJ would need to analyze all four industrial factors of causation to determine if a combination of factors exceeded the substantial cause threshold of 35 to 40 percent.

We returned the matter to the trial level for further analysis, accordingly.

On May 31, 2022, the WCJ issued the instant F&O, determining that applicant did not meet her burden of proof under section 3208.3, and that applicant did not sustain psychiatric injury. (Findings of Fact Nos. 1 & 2.) While the WCJ did analyze the three remaining factors of industrial causation and concluded that the employer actions in each instance were "appropriate," the WCJ did not determine whether the three remaining factors were personnel actions. (Opinion on

Decision, at pp. 10-12.) The WCJ again misapplied the legal standards articulated in *Rolda* and the statutory framework in section 3208.3, despite the guidance we provided in our decision of January 14, 2022, and concluded that because 40 percent of applicant's psychiatric injury was caused by nonindustrial factors, and because defendant was "not liable" for at least one of the four industrial factors constituting an additional 15 percent causation, that applicant had not established that actual events of employment were the predominant cause of her psychiatric injury. (*Id.* at p. 10)

However, this analysis misconstrues the compensability requirements under section 3208.3 with respect to a claim of psychiatric injury. Section 3208.3(b)(1) requires the applicant "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).) Here, there is no dispute that the QME has opined that 60 percent of applicant's psychiatric injury was caused by actual events of employment. (Ex. R, Report of Boukje Eerkens, Psy.D., dated May 23, 2017, at p. 2.) Thus, applicant's claim of psychiatric injury meets the predominance requirements of section 3208.3(b)(1).

The F&O finds that the supervisor reprimand, identified by the QME as an actual event of employment, was good-faith personnel action. (Opinion on Decision, at p. 10.) The WCJ then *adds* the corresponding 15 percent corresponding to an actual event of employment to the nonindustrial 40 percent causation to determine that applicant has not met her burden of establishing predominance. However, the analysis is legally incorrect because the supervisor reprimand was an *actual event of employment* and cannot be added back to *nonindustrial* factors to determine that actual events of employment were not predominant. In other words, the predominance issue was fully addressed and resolved in applicant's favor when the QME determined that 60 percent of her injury was caused by industrial factors. The remaining analysis required under *Rolda* involves determining whether the actual events of employment (the 60 percent identified by the QME) included lawful, nondiscriminatory good faith personnel action, and whether those actions were a substantial cause of applicant's injury. (See also, *San Francisco Unif. School Dist. v. Workers' Comp. Appeals Bd.* (*Cardozo*) (2010) 190 Cal.App.4th 1 [75 Cal.Comp.Cases].) This is why we returned the matter to the WCJ in our January 14, 2022 Opinion, because of the four factors comprising the 60 percent of causation as identified by the QME, the WCJ had only assessed

whether one of the factors (the supervisor reprimand) constituted personnel action.[2] (Opinion and Decision After Reconsideration, dated January 14, 2022, at p. 7.)

Thus, the May 31, 2022 F&O, which finds that applicant did not meet her burden of proof under section 3208.3, is based on an impermissible aggregation of both industrial and nonindustrial factors to determine that applicant did not meet her burden of establishing that her psychiatric injury was predominantly caused by actual events of employment. The analysis used to reach the Findings of Fact is clearly erroneous. Because the QME has determined that 60 percent of applicant's injuries were caused by actual events of employment, we conclude that applicant has met the burden of establishing that actual events of employment were the predominant cause of her psychiatric injury. (Lab. Code, § 3208.3(b)(1).)

We next turn to the issue of whether compensation for applicant's claim of psychiatric injury is barred under section 3208.3(h) because it was substantially caused by lawful, nondiscriminatory, good-faith personnel action.

In *Larch v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831 [1998 Cal. Wrk. Comp. LEXIS 4762], we discussed the analysis necessary to determine whether an actual event of employment was a personnel action, and whether such action was lawful, nondiscriminatory, and in good-faith. In *Larch*, the applicant was a sheriff's sergeant who was confronted by a fellow sergeant about her handling of a staffing conflict. (*Id.* at p. 832.) In assessing whether this confrontation by a fellow sergeant constituted personnel action, we observed that the legislature's 1993 amendments to section 3208.3 replaced the former, broader requirement of a "regular and routine employment event," in favor of the current "substantially caused by lawful, nondiscriminatory, good faith personnel action" requirement. (*Id*. at p. 833.) We also noted that "[w]hat constitutes a 'personnel action' depends on the subject matter and factual setting for each case. The term includes but is not necessarily limited to a termination of employment." (*Ibid.*) Our decision in *Larch* adopted the WCJ's analysis that "the term personnel action was not intended to cover all actions by any level of personnel in the employment situation or all happenings in the workplace done in good faith, as this would be too broad an interpretation that would preclude

[2] We also note that the WCJ described the employer as "not liable" for the identified personnel action. However, the bar to compensation for good faith personnel action only applies when personnel action, individually or in the aggregate, was a substantial cause of the psychiatric injury, in which case the employer has no liability for the entire psychiatric injury. (Lab. Code, § 3208.3(h).) If the personnel action(s) was not a substantial cause of the psychiatric injury, and the employee otherwise meets the predominance requirements of section 3208.3(b), the employer is liable for the entire psychiatric injury, including the personnel action, less any applicable legal apportionment.

from consideration practically all events occurring such as workloads imposed in good faith." (*Id*. at 834.) In determining what constitutes personnel action for purposes of section 3208.3(h), we concluded:

> 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 834-835.)

The need to distinguish between generalized administrative activities and directed personnel action is well-established in California workers' compensation jurisprudence. In *County of Butte v. Workers Compensation Appeals Bd. (Purcell)* (2000) 65 Cal.Comp.Cases 1053 [2000 Cal. Wrk. Comp. LEXIS 6485] (writ denied) (*Purcell*), the employer directed multiple memoranda to applicant Deputy Chief Probation Officer concerning alleged deficiencies in work performance, as management sought to change the "culture" in the department. (*Id*. at 1054-1055.) In evaluating whether these administrative actions rose to the level personnel action, we concurred with the WCJ's analysis that "every 'action by management' does not constitute a personnel action," and that an overly broad interpretation of managerial action as rising to the level of personnel action would effectively "deny compensability in any case involving an injury arising from management criticism of an employee's conduct." (*Id*. at 1058.)

Similarly, in *Kaiser Found. Hosps. v. Workers Compensation Appeals Bd. (Berman)* (2000) 65 Cal.Comp.Cases 563 [2000 Cal. Wrk. Comp. LEXIS 6298] (writ denied) (*Berman*), applicant alleged increased workload and stress as a result of corporate reorganization. We adopted and incorporated the opinion of the WCJ, who opined that section 3208.3 "was aimed instead at precluding psychiatric injury claims flowing from *individual adverse personnel actions*, or ones the affected employee perceives as negative. Otherwise an employer could re-organize its enterprise to place crushing responsibilities on the remaining employees, all with impunity for any emotional stress they might suffer as a result. The legislature cannot have meant to sanction such a result." (*Id*. at 564-565, *emphasis added*.)

Further, in *Joe v. County of Santa Clara-Probation Department* (June 26, 2015, ADJ8788887 [2015 Cal. Wrk. Comp. P.D. LEXIS 352] (WCAB panel decision), applicant

requested additional resources from management to help manage her workload, a request which management ultimately denied, citing reasons of efficiency and the need for automation. In assessing applicant's resulting claim for psychiatric injury, we found that "recognizing the distinction between a psychiatric injury caused by stressful working conditions, and an injury caused by a good faith nondiscriminatory 'personnel action' *directed towards an individual's employment status*, is both important and necessary," because "[w]ithout the distinction, the phrase 'personnel action' would encompass everything in the employment environment that stems from good faith management actions, and that 'would be too broad an interpretation that would preclude from consideration practically all events occurring such as workloads.'" (*Id*. at p. 11.)

We have applied similar reasoning to distinguish between administrative decisions and personnel action in a variety of subsequent WCAB panel decisions. (*Ferrell v. County of Riverside* (2016) 81 Cal.Comp.Cases 943 [2016 Cal. Wrk. Comp. P.D. LEXIS 322] (WCAB panel decision) [elimination of a department for budgetary reasons and reassignment of staff were general working conditions and not "personnel actions" within meaning of Labor Code § 3208.3(h)]; *Vayser v. Tarzana Treatment Centers* (September 22, 2016, ADJ9978575) [2016 Cal. Wrk. Comp. P.D. LEXIS 508] [change of work duties without adequate training not "personnel actions" within meaning of Labor Code § 3208.3(h).]; *Tiffany Merritt v. CDCR - Cal. Inst. for Women* (September 30, 2019, ADJ11125430) [2019 Cal. Wrk. Comp. P.D. LEXIS 420] [neither change in job responsibilities nor taking of applicant's keys was action directed towards applicant's employment status, but transferring applicant to new department was personnel action]; *Jose Garcia v. County of Riverside* (November 6, 2019, ADJ11160813) [2019 Cal. Wrk. Comp. P.D. LEXIS 447] [broadly applied change in job duties, not directed at applicant, constituted stressful working condition rather than "personnel action" under Labor Code § 3208.3(h)].)

Here, QME Dr. Eerkens has identified that 60 percent of applicant's psychiatric injury arose out of four discrete actual events of employment: (1) the supervisor reprimand of September 27, 2013 (15 percent); (2) applicant's experience of supervisor neglect during the physical intimidation and bullying on the part of the parents of the children she cares for (15 percent); (3) applicant's supervisor allowing parents to vent and scream at her during 2013 meeting (15 percent); and (4) excessive workload with a coworker who could not assist properly due to lack of mobility (15 percent). (Ex. R, Report of Boukje Eerkens, Psy.D., dated May 23, 2017, at pp. 2-3.)

The WCJ has previously analyzed the first factor, the "supervisor reprimand" of September 27, 2013, and determined that it constituted personnel action that was lawful, nondiscriminatory, and conducted in good-faith. (Opinion on Decision, dated June 9, 2021, at pp. 9-10.) The Letter of Concern discussed the events giving rise to the need for the actions taken by the District and included specific directives regarding future professional actions and expectations. (Ex. L, Letter of Concern, dated September 27, 2013.) Because of the serious nature of the incident involved and the employer's directives to the applicant regarding her future conduct at work, we agree that the September 27, 2013 "Letter of Concern" may reasonably be considered directed at applicant's employment status and/or part of a progressive discipline process. We therefore decline to disturb the WCJ's determination in this regard.

The three remaining events of employment that the QME identifies as factors of causation were applicant's experiences of supervisor neglect during the physical intimidation and bullying on the part of the parents of the children she cares for; applicant's supervisor allowing parents to vent and scream at her during 2013 meeting; and an excessive workload with a coworker who could not assist properly due to lack of mobility. The WCJ has analyzed each of these factors and determined in each instance that the employer's actions were "appropriate." (Opinion on Decision, dated May 31, 2022, at p. 15.)

However, the analysis is incomplete insofar as it does not address whether the three factors were lawful, nondiscriminatory, good-faith personnel actions. In applying the standards described in *Larch, supra*, and bearing in mind the distinction between personnel action and administrative action as described in *Purcell*, *Berman*, and *Joe*, *supra*, we conclude that none of these remaining events of employment were personnel actions. The record does not demonstrate that any of the alleged events of employment, such as the supervisor neglect, allowing parents to vent and scream during a meeting, or excessive workload, were directed at applicant's employment status. None of these occurrences were an initial step or a preliminary form of discipline intended to correct unacceptable or inappropriate conduct of an employee. None of these occurrences could reasonably be construed as a basis for subsequent or progressive discipline, and ultimately termination of the employment if the inappropriate conduct is not corrected. We acknowledge that the determination of whether any of these occurrences constitutes personnel action is dependent on the subject matter and factual setting in each case. (*Larch, supra*, 63 Cal.Comp.Cases at p. 833.) However, in this matter we are not persuaded that alleged employer failure to remediate applicant's

distress when she experienced alleged intimidation and bullying constituted personnel action directed against applicant's employment status. Similarly, we are not persuaded that the employer's alleged actions in allowing parents to vent and scream at a meeting or assigning an excessive workload when applicant's co-workers could not assist properly, constituted actions that were directed against applicant's employment status, or were a part of a progressive discipline program.

Having reviewed the entire record, it appears that none of the three remaining events of employment implicated applicant's employment status or could otherwise reasonably be construed as personnel action taken by the employer. Thus, of the four actual events of employment identified by the QME as causative of applicant's psychiatric injury, each causing 15 percent of the injury, only the "supervisor reprimand" constituted personnel action. Because only one event of employment was personnel action, and because that personnel action caused 15 percent of applicant's psychiatric injury, it appears that defendant has not met its burden of establishing that personnel action was a substantial cause (i.e., 35 to 40 percent) of applicant's injury. (Lab. Code, § 3208.3(h) ["the burden of proof shall rest with the party asserting the issue"].) Accordingly, we preliminarily conclude that compensation is not barred under section 3208.3(h).

Therefore, based on the clear legal error in the application of *Rolda* and the statutory language in section 3208.3, we notice our intention to exercise our continuing jurisdiction under section 5803 to set aside the May 31, 2022 Findings and Order and substitute new Findings of Fact that applicant sustained injury arising out and in the course of her employment and that compensation for applicant's psychiatric injury is not barred under section 3208.3(h).

For the foregoing reasons,

NOTICE IS HEREBY GIVEN that the Workers' Compensation Appeals Board intends to issue the following Decision After Reconsideration:

IT IS ORDERED that the May 31, 2022 Findings and Order is RESCINDED, and the following is SUBSTITUTED therefor:

FINDINGS OF FACT

1. Applicant Kathy Robinson, while employed on January 3, 2012 as a teacher, at Berkeley, California by the Berkeley Unified School District, sustained injury arising out of and in the course of employment to her psyche.
2. Compensation is not barred by Labor Code section 3208.3(h).

NOTICE IS FURTHER GIVEN that applicant and defendant may each file a response to this Notice of Intention. Responses shall only address the issues identified above. Responses shall be filed within twenty (20) days of service of this Notice of Intention, plus five (5) days under WCAB Rule 10605 (*Cal. Code Regs., tit. 8, § 10605*) and any additional day(s) as applicable under WCAB Rule 10600 (*Cal. Code Regs., tit. 8, § 10600*) and shall only be filed in the Electronic Adjudication Management System (EAMS).

IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in this case, all further pleadings, correspondence, objections, motions, requests, and communications *relating to the petition(s) or this Notice of Intention* shall be filed only in the Electronic Adjudication Management System (EAMS).

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 3, 2026

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

KATHY ROBINSON
LAW OFFICES OF RICHARD GREEN

SAR/abs

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