WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GAIL SEARS, *Applicant*

vs.

COUNTY OF FRESNO, permissibly self-insured, administered by AIMS, *Defendants*

Adjudication Number: ADJ9920866
Fresno District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case.[1] We now issue our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on October 21, 2019, wherein the WCJ found in pertinent part that applicant's injury did not arise out of or in the course of her employment (AOE/COE).

Applicant contends that the psychiatric qualified medical examiner (QME) found that actual events of employment were the predominant cause of her psychiatric injuries and that the WCJ should have found her injuries AOE/COE.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that we deny reconsideration. We received an answer from defendant.

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will rescind the F&O and return the matter to the WCJ for further proceedings consistent with this decision. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

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[1] Commissioner Dodd, who previously served as a panelist in this matter is unavailable to participate further. Another panel member was assigned in her place.

BACKGROUND

Applicant claimed injury to her psyche up to March 26, 2015 while employed by defendant as an attorney. Applicant was employed by defendant beginning in 1999, but alleges that her claimed injury was caused by events that occurred in the last year of employment.

On September 13, 2016, September 5, 2018, and November 30, 2018, applicant was evaluated by psychiatric qualified medical examiner (QME) Robindra Paul, M.D., (Exhibit AA, Report of Robindra Paul, M.D., dated September 13, 2016; Exhibit BB, Report of Robindra Paul, M.D., dated September 5, 2018; Exhibit CC, Report of Robindra Paul, M.D., dated November 30, 2018.)

Prior to drafting his initial 144 page medical-legal evaluation, Dr. Paul interviewed applicant on January 25, 2016, April 6, 2016, and August 16, 2016. (Exhibits AA-CC.) Dr. Paul took applicant's history, reviewed extensive medical records, including ongoing treatment notes of applicant's treating therapist, treating psychiatrist, and the results of a variety of psychiatric tests. (Exhibits AA-CC.)

Dr. Paul identified two separate psychiatric injuries, one based on work-related events in 2014 and the other based on work-related events in 2015. Dr. Paul opined that both injuries were caused by actual events of employment, which were predominant as to all causes. (Exhibit AA, at pp. 136-138, 141; Exhibit BB, at pp. 51- 56.)

As to applicant's first psychiatric injury, Dr. Paul opined:

> If a Trier of Fact determines that [co-worker] Amy [Cobb] lied or provided inaccurate information on the record in Judge Kams courtroom and [applicant's supervisor] Janelle did not correct the record in Judge Kams courtroom; it is my opinion, within reasonable medical probability, that the actual events of employment were predominant as to all causes of Ms. Sears' first psychiatric injury starting in 2014. This is based upon the following evidence.
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> 1. It is likely Ms. Sears' psychiatric injury was mainly caused by the following factors.
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>   A. Ms. Sears report that Amy lied on the record in Judge Kams' courtroom that the writ was filed.
>
>   B. Ms. Sears reporting that Janelle did not correct the record in Judge Kams' courtroom regarding Amy lying on the record.
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> ***

> If a Trier of Fact determines that Amy lied or provided inaccurate information on the record in Judge Kams' courtroom and [applicant's supervisor] Janelle did not correct the record in Judge Kams' courtroom; then my opinion is consistent with Ms. Sears' first claim of industrially-related psychiatric injury being compensable under the criteria established by current Workers' Compensation law.
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> (Exhibit AA, at pp. 138-140; Exhibit BB, at pp. 51- 54.)

As to the second injury, Dr. Paul opined:

> If a Trier of Fact determines that [co-worker] Amy [Cobb] lied or provided inaccurate information on the record in Judge Kams' courtroom and Janelle did not correct the record in Judge Kams courtroom; it is my opinion, within reasonable medical probability, that the actual events of employment were predominant as to all causes of Ms. Sears' second psychiatric injury starting in 2015.
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> ***
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> If a Trier of Fact determines that Amy lied or provided inaccurate information on the record in Judge Kams' courtroom and Janelle did not correct the record in Judge Kams courtroom; it is my opinion, within reasonable medical probability, that Ms. Sears' second psychiatric injury was at least substantially caused by personnel action.
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> If a Trier of Fact determines that Amy lied or provided inaccurate information on the record in Judge Kams' courtroom and Janelle did not correct the record in Judge Kams courtroom; a Trier of Fact must determine if the aforementioned personnel action was lawful, non-discriminatory and in good faith. Therefore, a Trier of Fact must determine if Ms. Sears' second psychiatric injury is compensable under the criteria established by current Workers' Compensation law.
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> (Exhibit AA, at pp. 140-142; Exhibit BB, at pp. 53- 55.)

The parties proceeded to trial on the issues of AOE/COE; temporary disability; permanent disability; apportionment; the need for further medical treatment; outstanding unpaid temporary disability; and attorney fees. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 22, 2019, at pp. 2:18-3:4.)

Defendant contended that applicant did not meet her burden as to predominant cause and raised an affirmative defense of a good-faith personnel action (GFPA). (MOH/SOE, August 22, 2019 trial, at p. 2:18-20.)

Applicant testified at trial, in pertinent part as follows:

> Applicant was an attorney for the County of Fresno County Counsel, assigned to the Department of Social Services (DPS), Child Protective Services (CPS). (MOH/SOE, August 22, 2019, p. 4.) She worked in the dependency court, where CPS social workers represent children's interests in court. (MOH/SOE, August 22, 2019, p. 4.)
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> In June 2014, a hearing was held on whether a juvenile's foster parents should be found de facto parents or whether the juvenile should be reunited with the mother. (MOH/SOE, August 22, 2019, p. 4.)
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> The judge acknowledged it was an unusual ruling, but ordered the juvenile be placed with a mentor and ordered DPS to commence proceedings for the juvenile's permanent placement. (MOH/SOE, August 22, 2019, p. 4.)
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> A status conference was set for July 2014, to assess how the child was progressing in the mentor placement. Appellate counsel Amy Cobb advised the client (CPS) to not obey the judge's order and to hold off on the transition until she filed a motion appealing the order's sufficiency. (MOH/SOE, August 22, 2019, p. 5.) The motion was denied and, as far as applicant knew, Ms. Cobb filed a writ to challenge the order and a hearing on the writ was scheduled for August 22, 2014. (MOH/SOE, August 22, 2019, p. 5.)
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> Applicant was upset because her client was being instructed to defy a court order. The week prior to the hearing on the writ, applicant became concerned that Ms. Cobb had not actually filed the writ with the court. (MOH/SOE, August 22, 2019, p. 5.)
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> Applicant's supervisor, Janelle Kelly, told applicant that she was upset that applicant did not come to her (Ms. Kelly) before she contacted someone else about the writ. (MOH/SOE, August 22, 2019, p. 5.)
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> Thereafter, Ms. Cobb told applicant that Ms. Kelly told her (Ms. Cobb) to tell applicant that the writ had been filed. (MOH/SOE, August 22, 2019, p. 5.)

> On August 22, 2014, applicant was present for an off-the-record discussion between the judge, Ms. Cobb, the juvenile's attorney Catherine Hicks, and the mother's attorney Heather Wong. (MOH/SOE, August 22, 2019, p. 5.) Ms. Hicks told the judge that it was her understanding that a writ was filed. Ms. Cobb told the judge that a writ had been filed, but Ms. Wong stated that she had not received notification of a writ. (MOH/SOE, August 22, 2019, p. 5.)
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> After the hearing on August 22, 2014, Ms. Cobb's assistant went to the Court of Appeal to file the writ. (MOH/SOE, August 22, 2019, pp. 5-6.) The office paralegal accessed the appellate records to confirm that a writ had not been filed on behalf of CPS. Applicant believes Ms. Cobb lied to the Court during the discussion.
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> Applicant spoke with her co-worker Richard Bailey on August 22, 2014, because she was upset by what happened at the hearing. At some point, applicant told Ms. Cobb that she felt she needed to instruct her client to follow the judge's order about placing the juvenile with the mentor. (MOH/SOE, August 22, 2019, p. 6.) Applicant subsequently learned that Ms. Hicks filed a writ on behalf of the juvenile. (MOH/SOE, August 22, 2019, p. 5.)
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> On August 25, 2014, the environment at work became uncomfortable for applicant. Ms. Kelly met with Cathy Basham, the employment attorney for the county, and had other closed-door meetings. (MOH/SOE, August 22, 2019, p. 7.)

Applicant's co-worker Richard Bailey testified at trial, in pertinent part as follows:

> He was an employee for County Counsel for the County of Fresno for 20 or 21 years. He is a legal specialist in child welfare. He trained applicant and worked with her in the dependency unit for many years. He retired as County Counsel on February 28, 2015. (MOH/SOE, August 22, 2019, p. 8.)
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> In June 2014 he was aware that Judge Kams made a sua sponte order. The CPS department asked for a writ to be filed in response to Judge Kams' order. On August 22, 2014, the writ was sent out to be filed at 11:30 a.m. He was astonished that the CPS writ had not been filed before Ms. Cobb left for court on August 22, 2014. (MOH/SOE, August 22, 2019, p. 8.) It was a highly stressful situation, followed by an investigation regarding Ms. Cobb's alleged misrepresentation to the court. (MOH/SOE, August 22, 2019, pp. 8-9.) He believes everyone in the office was anxious about this writ. (MOH/SOE, August 22, 2019, pp. 8-9.) He ultimately retired

> because of the situation, leaving in February 2015. (MOH/SOE, August 22, 2019, p. 8.)

Finally, Amy Cobb testified on defendant's behalf that she did not believe that she presented inaccurate information to the court, and that the writ was filed on August 22, 2014.

Defendant did not call Janelle Kelly or any other management witness to testify with respect to its allegation that applicant's claimed injury was caused by GFPA.

DISCUSSION

Labor Code Section 3208.3 states that in order to establish industrial causation of a psychiatric injury, an injured worker must show by a preponderance of the evidence that actual events of employment predominantly caused the psychological injury.[2] (Lab. Code, § 3208.3(b)(1).)[3] However, it also provides that a claim for psychiatric injury will not be compensable if an employer proves that the psychiatric injury was substantially caused by lawful, nondiscriminatory, good faith personnel actions. (Lab. Code, § 3208.3(h).)[4]

A multilevel analysis is accordingly required when an industrial psychiatric injury is alleged and the employer raises the affirmative defense of a lawful, nondiscriminatory, good faith personnel action. (*Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc) (*Rolda*).) After considering all the medical evidence, and the other documentary and testimonial evidence of record, the WCJ must determine:

(1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination for the WCJ;

(2) if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires competent medical evidence;

(3) if so, a further determination must be made establishing whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith - a factual/legal determination for the WCJ; and

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[2] "[T]he phrase 'predominant as to all causes' is intended to require that the work-related cause has greater than a 50 percent share of the entire set of causal factors." (*Department of Corrections v. Workers' Comp. Appeals Bd.* (*Garcia*) (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356, 1360].)

[3] All future statutory references are to the Labor Code unless otherwise specified.

[4] The term "substantial cause" is defined in section 3208.3(b)(3) as "at least 35 to 40 percent of the causation from all sources combined."

(4) if so, a determination must be made as to whether the lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" of the psychiatric injury.

(*Rolda, supra*., at p. 247; see also *County of Sacramento v. Workers' Comp. Appeals Bd. (Brooks)* (2013) 215 Cal.App.4th 785 [78 Cal.Comp.Cases 379]; *San Francisco Unified School Dist. v. Workers' Comp. Appeals Bd*. *(Cardozo)* (2013) 190 Cal.App.4th 1 [75 Cal.Comp.Cases 1251].)

Under section 3208.1, an injury may be either a specific injury or a cumulative injury. Subdivision (b) defines a "cumulative" injury as "occurring as repetitive mentally . . . traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." The number of injuries and the nature of those injuries are questions of fact for the WCAB. (See *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd*. (*Austin*) (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323] (*Western Growers*).)

Here, applicant testified regarding attending hearings at court and about speaking with her supervisor and various co-workers regarding the events. Applicant's co-worker Richard Bailey testified that people in the office were anxious about the writ and the investigation regarding Ms. Cobb's alleged misrepresentation to the court, and that it was a highly stressful situation. (MOH/SOE, August 22, 2019, pp. 8-9.) Consequently, it appears that there is no dispute as to whether applicant's interactions with her coworkers and supervisors, as she described to Dr. Paul and testified at trial, actually occurred. Thus, we are persuaded that the trial record contains substantial evidence that actual events of employment were involved, thereby potentially satisfying the first prong of the *Rolda* analysis. (See *Cardozo, supra*; *Rolda, supra*, at p. 247.) However, upon return, the WCJ must specifically identify the events of employment, bearing in mind that several events may have occurred during one period of cumulative trauma.

The overview in *Cardozo* regarding the sequence of the *Rolda* analysis and the roles of the WCJ and the medical evaluator is particularly instructive. After the WCJ determines that an alleged psychiatric injury involves actual events of employment, the WCJ must determine "whether competent medical evidence establishes the required percentage of industrial causation." (*Cardozo, supra; Rolda, supra*, at pp. 245-247.) To be substantial evidence, a medical opinion must be well-reasoned, based on an adequate history and examination, and it must disclose a solid underlying basis for the opinion. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) A medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, and not merely their conclusions. (*Hegglin v. Workmen's Comp.*

Appeals Bd. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workmen's Comp. Appeals Bd*. (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Escobedo, supra*.) The WCJ has the authority to order additional medical evidence when required for substantial evidence. (Lab. Code, §§ 5701, 5906; *Old Republic Ins. Co. v. Workers' Comp. Appeals Bd*. (*Cortes*) (2020) 85 Cal.Comp.Cases 504, 508 (writ den.); *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].)

As noted above, Dr. Paul interviewed applicant several times from 2016 to 2018; took a detailed history; reviewed extensive medical records, including ongoing treatment notes of applicant's treating therapist, treating psychiatrist, and had applicant undergo psychological testing. (Exhibits AA-CC.) In his reports, Dr. Paul discussed applicant's history and treatment, explained his analysis, and explained his reasoning for reaching his conclusions. He identified two psychiatric injuries and he opined that actual events of employment were predominant as to all causes of both psychiatric injuries. (Exhibit AA, at pp. 136-138, 141; Exhibit BB, at pp. 51- 56.) However, there is simply no basis in the evidentiary record for Dr. Paul's conclusion that two separate injuries occurred. It is apparent that he misunderstood the legal definition of a cumulative injury and misunderstood that a number of events occurring within a continuous period of time could constitute a single cumulative injury and misunderstood that the effects of an injury may not constitute a separate injury. Thus, his reports do not constitute substantial medical evidence. Accordingly, once the WCJ has clarified the events of employment and the period of injury, the record must be further developed by way of further medical evidence to determine whether the events of applicant's employment were the predominant cause of her injury.

Moreover, Dr. Paul opined that applicant's "first injury" was predominantly caused by her perception that her co-worker Ms. Cobb lied and/or made misrepresentations to the court and applicant's supervisor's response, or alleged lack thereof, to Ms. Cobb's actions. We observe that the analysis here does not turn on whether Ms. Cobb lied to the court or her supervisor's response to the circumstances. There is no dispute that applicant was in court and observed Ms. Cobb discussing the case with the judge and other attorneys. There is no dispute that applicant's supervisor knew of Ms. Cobb's actions. Consequently, the analysis should focus on whether the events as experienced by applicant caused injury to applicant. With respect to applicant's "second injury," Dr. Paul opined that it was 50% caused by applicant's change of position and her feeling that her supervisor was going to scrutinize her and 50% caused by the first psychiatric injury,

which resulted in applicant feeling "complicit in lying to an officer of the court." However, it is unclear from applicant's testimony at trial how or if her position changed after August 2014, and defendant presented no evidence that changes had occurred. Accordingly, at this juncture, it appears that the evidence in the record does not support defendant's contention that applicant's injury was caused by personnel actions, that were lawful, nondiscriminatory, and made in good faith. (See *Larch (Fleming) v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831, 833 [defining a personnel action as conduct either by or attributable to management, which includes actions taken by someone who has the authority to "review, criticize, demote, transfer or discipline an employee in good faith"].)

As discussed above, upon return of this matter, we recommend that the WCJ clarify the events of employment and the date of injury and that thereafter, the medical record can be further developed by way of further opinion from Dr. Paul. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 139, 142 (Appeals Board en banc).) Alternatively, the parties may wish to agree to an agreed medical evaluator or the WCJ may appoint a regular physician pursuant to section 5701.[5]

Accordingly, we rescind the F&O, return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

[5] Based on a review of the pleadings, we have observed references to sealing the record. WCAB Rule 10813, formerly WCAB Rule 10754, allows the WCJ to seal documents in an adjudication case file, but only after expressly finding facts that establish: (1) There exists an overriding public interest that overcomes the right of public access to the record; (2) The overriding public interest supports sealing the record; (3) A substantial probability exists that the overriding public interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exists to achieve the overriding public interest. (Cal. Code Regs., tit. 8, former § 10754, now § 10813 (eff. Jan. 1, 2020).)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of October 21, 2019 is **RESCINDED** and the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 24, 2021

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

GAIL SEARS
JEANIE SEARS, GUARDIAN AD LITEM
THOMAS TUSAN, ESQ.
PARKER, KERN, NARD & WENZEL

JB/abs

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