WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICK ROLDA *Applicant,* vs. **PITNEY BOWES, INC., Permissibly Self-Insured,** *Defendant (s)*	**Case No. VNO 359401** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

On September 11, 2000, the Workers' Compensation Appeals Board (Board) granted defendant's petition for reconsideration of the Findings and Award issued by the workers' compensation administrative law judge (WCJ) on June 19, 2000. The WCJ found that applicant, while employed as a salesman from September 1995 to September 17, 1997, sustained industrial injury to his psyche, causing disability and the need for further medical treatment. In his Opinion on Decision, the WCJ also stated that applicant's psychiatric injury was not the result of a good faith personnel action. Defendant contends that any psychiatric injury sustained by applicant was caused by a good faith personnel action within the meaning of Labor Code section 3208.3(h) and therefore, no compensation is payable.

Because of the important legal issue presented, that is, the proper analysis to be followed in cases involving the application of Labor Code section 3208.3(h), and in order to secure uniformity of decision in the future, the Chairman of the Board, upon a majority vote of its members, has reassigned this case to the Board as a whole for an *en banc* decision. (Lab. Code, §115.)

As discussed below, we conclude that a multilevel analysis is required when a psychiatric injury is alleged and the defense of a lawful, nondiscriminatory, good faith personnel action has been raised. First, the WCJ must determine whether the alleged psychiatric injury involves actual events of employment, and if so, whether competent medical evidence establishes the required percentage of industrial causation. If these first two conditions are met, the WCJ must then decide whether any of the actual employment events were personnel actions. If so, the WCJ must next determine whether the personnel action or actions were lawful, nondiscriminatory and made in good faith. Finally, if all these criteria are met, competent medical evidence is necessary as to causation; that is, whether or not the personnel action or actions are a substantial cause, accounting for at least 35 to 40 percent, of the psychiatric injury. As the psychiatric injury in this case was not evaluated in this manner, we will rescind the Findings and Award of June 19, 2000, and return this matter to the trial level for further proceedings and decision.

I. BACKGROUND

Applicant was employed by defendant as a business machine salesman commencing in November 1995. He was assigned a territory in which to work, where he would call upon existing patrons and make sales presentations to potential customers. Applicant's supervisor was Mr. James Brown, Jr.

Applicant was apparently dissatisfied with the manner in which Mr. Brown handled at least two episodes involving disputes between applicant and other salesmen over territory and clients. Mr. Brown, however, did not deem his performance as a salesman to be fully satisfactory, and according to applicant, recommended sometime in the first quarter or mid-1997, that he should consider resigning. Another supervisor apparently told applicant on at least one occasion that "this job may not be for him." Applicant apparently told Mr. Brown in the second or third quarter of 1997 that he was suffering from stress during a conversation about customers.

Prior to taking a vacation/leave of absence commencing October 1997 in the Philippines, where a relative was dying of cancer, applicant filed claims for orthopedic and psychiatric industrial cumulative injuries sustained through September 17, 1997. The primary basis for applicant's psychiatric claim was that he was discriminated against and harassed by Mr. Brown and other supervisors.

By letter dated November 4, 1997, defendant apparently sent a letter to the applicant's residence informing him that it was approving his request for extending his leave of absence, which had been received via facsimile that day. The letter noted, however, that there was "no guarantee of re-employment," that his territory would "be filled," and that he was to contact Mr. Brown at least two weeks before his anticipated return to see if a territory was available.

Applicant later testified, however, that he did not recall that he or any family member saw the defendant's November 4, 1997 letter, and that no one had told him about the letter while he was in the Philippines. When he returned, he said he was surprised upon hearing from his wife that his territory could or would be reassigned. Applicant stated that he did not recall being told that he could lose his territory while out on extended leave.

Upon his return from the Philippines in December 1997, applicant's territory had, in fact, been reassigned. He declined defendant's offer of other territories that were a substantially greater distance from his home, e.g., at least a two-hour drive one way. Applicant never returned to work for defendant.

After being treated for the injury alleged to his psyche until March 6, 1998, by Sean Pakdaman, Ph.D., of the California Stress Control Clinic, applicant was referred by defense counsel for psychiatric evaluation and psychological testing to Brian P. Jacks, M.D. Dr. Jacks submitted a report dated March 18, 1998, in which he concluded:

> "As far as causation is concerned, I do not have personnel records from Pitney Bowes or sworn statements from people at work. However, at this time, the difficulties that he alleges seem to be due to routine personnel actions or lawful non-discriminatory personnel actions. Giving him the full benefit of the doubt these routine personnel matters may have been

> misinterpreted by Mr. Rolda based upon socio-cultural issues but sales managers who are strong in trying to prompt and motivate their sales representatives to meet sales quotas are not exceptional or special or specific just to this company.
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> "Secondly, what he is most concerned about and upset about is being fired, being out of work, having financial problems and having difficulties locating a new job. Finally, there are the personal non-industrial stresses of two deaths in the family. "In summary, then, the predominant cause of this man's emotional difficulty are [sic] non-industrial . . ."

Applicant was then referred by his attorney to Thomas A. Curtis, M.D., who also provided treatment. In his November 17, 1998 report, Dr. Curtis discussed at length his disagreement with Dr. Jacks' opinion, and concluded that applicant had sustained an industrial injury to the psyche. Dr. Curtis stated:

> "In this particular case the 44-year-old account executive and outside person, an employee for Pitney Bowes for just over two years, revealed a convincing description of humiliation, mistreatment and discrimination against him as a foreign-born Filipino man. There w[ere] also emotional complications of physical trauma, pain and disability due to work. These factors plus the particularly personal rejection experience and wrongfulness of the perceived discrimination has evoked a . . . depression that has been stabilizing with treatment at a substantial level of residuals of permanent emotional impairment.
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> ". . .
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> "Assuming the facts provided by Mr. Rolda are accurate and correct, it would be considered credible that Mr. Rolda's emotional symptoms arose as he described from his work at Pitney Bowes.
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> "It would be concluded that Mr. Rolda sustained an industrial injury to the psyche."

Following the mandatory settlement conference (MSC) held on March 9, 1999, this matter proceeded to trial on April 8, 1999. Among the issues raised at trial were industrial injury, and the defense of a good faith personnel action pursuant to Labor Code section 3208.3(h).

Applicant was the only witness at the April 8, 1999 hearing. Following the hearing, the

WCJ ordered the matter off calendar, and allowed further discovery "in the form of psychiatric medical examination and report."

After further psychiatric evaluation, and supplemental reports submitted by Drs. Curtis and Jacks, in which the physicians did not fundamentally change their opinions, this matter proceeded to hearing on March 27, 2000. Applicant, Mr. Brown, who was applicant's direct supervisor, and Mr. Richman, another supervisor, testified.

Among other things, there was conflicting testimony as to whether Mr. Brown had ever suggested that applicant resign. Mr. Brown, however, agreed with applicant that his position was stressful, and testified that the applicant had difficulty meeting his sales goals. Applicant also testified that he felt discriminated against by Mr. Richman and another co-employee, "who jumped on him for calling on a customer," and that Mr. Richman expressed his displeasure in front of two other senior employees. Mr. Richman, however, in testifying about the same incident, stated that applicant seemed quite upset and he tried to calm him down. Mr. Richman further testified that he had told applicant on that one occasion only that this job was not for everyone, and that he never told applicant that he should resign.

Following the March 27, 2000 hearing this matter was submitted for decision. On May 17, 2000, the WCJ issued rating instructions based on Dr. Curtis' November 17, 1998 report.

On June 19, 2000, the WCJ issued Findings and Award, in which he determined, among other things, that applicant had sustained industrial injury to his psyche while employed as a salesman from September 1995 to September 17, 1997, causing disability and the need for further medical treatment. In his Opinion on Decision, the WCJ indicated his reliance on Dr. Curtis' opinion and applicant's testimony. Without further analysis, the WCJ stated that applicant's psychiatric injury "was not the result of a good faith personnel action."

In response to the defendant's petition for reconsideration, the WCJ's report and recommendation (report) recounted testimony tending to support applicant, and concluded:

> "Dr. Curtis also had a history of Applicant's territory being taken away from him when he returned from the Philippines. It does appear that this action was a good faith personnel action, since Applicant had in fact overstayed his approved vacation time and management found it necessary to reassign Applicant's territory. However, this was only one of the many factors considered by Dr. Curtis in determining that Applicant's employment led to his suffering psychiatric injury. Both Applicant's testimony and the history contained in Dr. Curtis's report support the conclusion reached by Dr. Curtis, even if the decision to reassign Applicant's territory is excluded."

On September 11, 2000, reconsideration was granted in order to allow sufficient opportunity to further study the factual and legal issues in this case, and it was subsequently determined that an en banc decision would be appropriate.

II. DISCUSSION

Labor Code section 3208.3, in pertinent part, and as applicable to this case, provides:

> "(b) (1) 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.
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> "(2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.
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> "(3) For the purposes of this section, 'substantial cause' means at least 35 to 40 percent of the causation from all sources combined.
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> "(h) 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."

Thus, under Labor Code section 3208.3, the first determination to be made with respect to the compensability of an alleged psychiatric injury is whether actual events of employment are involved. This is a factual/legal issue for the WCJ to determine, not a medical issue.

The next determination, causation of the psychiatric injury, however, requires competent medical evidence. (See, e.g., *20th Century Fox Film Corp. v. Workers' Comp. Appeals Bd. (Conway)* (1981) 141 Cal.App.3d 778, 784 [48 Cal.Comp.Cases 275, 280]; *Insurance Co. of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 68 Cal.App.3d 905, 911[46 Cal.Comp.Cases 913, 917].) Under Labor Code section 3208.3, the causation threshold "is predominant as to all causes combined" (subdivision (b) (1)), or "a substantial cause" where the injury resulted from being the victim of a violent act (subdivision (b) (2)).

While "substantial cause" is defined in subdivision (b) (3) as "at least 35 to 40 percent of the causation from all sources combined," the phrase "predominant as to all causes" is not defined in the statute itself or elsewhere in the Labor Code. However, in *Department of Corrections/State of California v. Workers' Comp. Appeals Bd. (Garcia)* (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356, 1360], the Court stated that this phrase was "intended to require that the work-related cause has greater than a 50 percent share of the entire set of causal factors."

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.

In *Larch v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831, 833-839 and *Stockman v. State of California/Department of Corrections* (1998) 63 Cal.Comp.Cases 1042, 1044-1047, both significant panel decisions, the Board set forth guidelines for determination of these issues by the WCJ. (See also *County of Butte v. Workers' Comp. Appeals Bd. (Purcell)* (2000) 65 Cal.Comp.Cases 1054 (writ denied) [memos which criticized the applicant's job performance, but did not contain disciplinary actions, threats or warnings of disciplinary actions, were not personnel actions]; *Contel of California* v. *Workers' Comp. Appeals Bd. (Holly)* (1998) 63 Cal.Comp.Cases 847 (writ denied) [discipline in a manner contrary to the employer's policy manual is not a good faith personnel action]; *County of Kern v. Workers' Comp. Appeals Bd. (Johnson)* (1998) 63 Cal.Comp.Cases 1068 (writ denied) [supervision by harassment, ridicule, and generally unprofessional conduct is not a good faith personnel action].)

Finally, if any lawful, nondiscriminatory, good faith personnel actions contributed to the injury, medical evidence is required to determine whether such personnel actions were a substantial cause, 35 to 40 percent, of the injury, as defined by subdivision (b) (3).

The foregoing analysis requires the evaluating physicians to take a history of all events alleged to have contributed to the psychiatric injury, to render an opinion as to causation in terms of first whether the employment events were a predominant, or greater than fifty percent, cause of the injury.[1] Then, where it has been claimed, as here, that the applicant's injury is the result of a lawful, nondiscriminatory, good faith personnel action, the evaluating physicians must also offer their opinion as to the percentage of causation for any such alleged or apparent actions.

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

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[1]As this case, and most cases of alleged psychiatric injury, do not involve victims of violent acts, we will not reiterate the causation standard for those injuries.

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.

In the present case, as set forth above, neither the WCJ's decision, his report, nor the medical evidence, including that relied on by the WCJ, complies with the multilevel analysis necessary to determine the compensability of the psychiatric injury alleged in this case. Accordingly, we will rescind the Findings and Award of June 19, 2000, and return this matter to the trial level for further development of the record as appropriate for such determination by the WCJ.

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For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Board (En Banc) that the Findings and Award of June 19, 2000, is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

MERLE C. RABINE, Chairman

ROBERT N. RUGGLES, Commissioner

COLLEEN S. CASEY, Commissioner

ROBERT E. BURTON, Commissioner

WILLIAM K. O'BRIEN, Commissioner

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

FEB 21 2001

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES SHOWN ON THE OFFICIAL ADDRESS RECORD EXCEPT THE LIEN CLAIMANTS.

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