

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **TIMOTHY KIRBY,**

5 *Applicant,*

6
7 **vs.**

8 **CONTRA COSTA WATER**
9 **DISTRICT, permissibly self-insured,**
10 **administered by YORK RISK SERVICES,**

11 *Defendants.*

Case No. ADJ10289629
(Oakland District Office)

OPINION AND DECISION
AFTER
RECONSIDERATION

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13 We granted Defendant's Petition for Reconsideration (Petition) to further study the factual and
14 legal issues in this case. This is our Opinion and Decision After Reconsideration.

15 Defendant seeks reconsideration of the Findings, Award and Order (F&A) issued by the workers'
16 compensation administrative law judge (WCJ) on November 29, 2016 wherein the WCJ found in
17 pertinent part that applicant sustained a psychiatric injury, that the injury claim was not barred by Labor
18 Code section 3208.3(h), that applicant was temporarily totally disabled as of March 12, 2015, and
19 continuing, and that the EDD lien was denied.

20 Defendant contends that applicant did not meet his burden of proof that actual employment events
21 were the predominant cause of his psychiatric injury; that the actions of applicant's supervisor were good
22 faith personnel actions; that applicant was not temporarily totally disabled; that "applicant failed to
23 mitigate his losses"; and that applicant is not entitled to receive temporary disability indemnity for the
24 same period that he received state disability indemnity (SDI) benefits from the Employment
25 Development Department (EDD).

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1 We received a Report and Recommendation on Petition for Reconsideration (Report) from the
2 WCJ recommending the Petition be denied. We received an Answer from applicant.¹

3 We have considered the allegations in the Petition and the Answer and the contents of the Report.
4 Based on our review of the record, for the reasons stated in the Report, which we adopt and incorporate,
5 except for subsection I "Different Viewpoints," (Report, pp. 2 – 3.) and for the reasons discussed below,
6 we will affirm the F&A.

7 BACKGROUND

8 Applicant claimed a psychiatric injury while employed by defendant as a crew leader during the
9 period from March 11, 2014 through March 11, 2015. Applicant received treatment from David L.
10 Green, Ph.D., (App. Exh. 1, David L. Green, Ph.D.) and on August 5, 2015 applicant was examined by
11 Robert W. Poston, Ph.D., the Qualified Medical Evaluator (QME) in psychology. (App. Exh. 2, Robert
12 W. Poston, Ph.D., August 5, 2015.)

13 On June 3, 2015 Dr. Green submitted a treatment note stating that "On a psychological basis"
14 applicant could not return to "work in his department." (App. Exh. 1, p. 1.) In each of his treatment notes
15 the doctor reiterated his opinion that applicant temporarily could not return to work in his department.
16 (App. Exh. 1, pp. 2 – 10.)

17 After examining applicant and reviewing the medical record, Dr. Poston stated:

18 "Mr. Kirby's psychiatric condition is such he would be expected to have
19 some difficulty performing in the workplace, but not to the extent he is
20 seen as totally or partially disabled. At the same time, it is quite clear a
21 return to work under the supervision of Mr. Kelly or Mr. Bartiz would
22 likely have quite a deleterious effect on his psyche. A successful return to
work will necessitate he work in a different setting. He is not yet seen as
having reached maximum medical improvement."

23 (App. Exh. 2, Robert W Poston, Ph.D., September 5, 2015, pp. 17 – 18.)
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25 ¹ Defendant e-filed a Petition For Leave to File a Reply to Report and Recommendation on Petition for Reconsideration and
26 subsequently filed the petition with the WCAB. We note that the Reply, attached to both copies of the petition, appears to
27 have been filed incorrectly because only the first page and the last page are included and it does not actually contain the
argument referred to in the petition. Thus, defendant's request is not approved and the petition and the Reply will not be
considered. (see Cal. Code Regs., tit. 8, § 10848.)

1 The parties proceeded to trial on September 9, 2016.

2 DISCUSSION

3 In his Report the WCJ commented on the testimony of the witnesses with respect to the issues of
4 actual events of employment and good faith personnel action. (Report, pp. 3 – 4, pp. 14 – 15.)

5 The WCJ's findings on credibility are entitled to great weight, "because of the referee's [WCJ's]
6 opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their
7 manner on the stand." (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35
8 Cal.Comp.Cases 500, 505]; *Nash v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1793, 59
9 Cal.Comp.Cases 324; *Greenberg v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal.App.3d 792, 39
10 Cal.Comp.Cases 242.)

11 Also, a WCJ is required to prepare an opinion on decision that includes "a summary of evidence
12 received and relied upon and the reasons or grounds upon which the determination was made." (Lab.
13 Code, §5313; Cal. Code Regs., tit. 8, § 10566.) Here, in his Opinion on Decision, the WCJ discussed at
14 length the witness testimony and he explained in detail the reasoning and rationale for his findings on the
15 credibility of the witnesses. He explained why the testimony of the witnesses constituted evidence that
16 actual events of employment were "75% of the causation" of applicant's psychiatric injury. (Opinion on
17 Decision pp. 3 – 4; Report, pp. 4 – 5.) We accept the WCJ's findings on credibility and do not disturb his
18 decision that applicant sustained injury AOE/COE and that applicant's injury claim was not barred by the
19 good faith personnel defense.

20 Regarding temporary disability, when an industrial injury causes an employee to be restricted
21 from working, either totally or partially, the employee may be entitled to receive temporary disability
22 indemnity. (Lab. Code, §§ 4650, 4653, 4655 and 4656). The purpose of temporary disability indemnity is
23 to provide interim wage replacement assistance to an injured worker during the period of time he or she
24 is healing and incapable of working. The employer's obligation to pay temporary disability benefits is the
25 result of the employee's inability to perform the tasks usually encountered in his or her employment and
26 the wage loss resulting therefrom. (*Meeks Building Center v. Workers' Comp. Appeals Bd.*, (2012) 207
27 Cal.App.4th 219 [77 Cal.Comp.Cases 615]; *Herrera v. Workers' Comp. Appeals Bd.* (1969) 71 Cal. 2d

1 254 [34 Cal.Comp.Cases 382]; *Allied Compensation Ins. Co. v. Industrial Acci. Com.*, (1963) 211 Cal.
2 App. 2d 821, [28 Cal.Comp.Cases 11]).

3 Although a temporarily partially disabled worker is expected to work while partially disabled if
4 suitable work is available, as the Supreme Court explained:

5 “Under the ‘odd lot’ doctrine, a worker who is only partially disabled may
6 receive temporary total disability payments if his partial disability results in
7 a total loss of wages. (*Pacific Employers Ins. Co. v. Industrial Acc. Com.*
8 (1959) 52 Cal.2d 417, 421 [340 P.2d 622].) This doctrine places the burden
9 on the employer to show that work within the capabilities of the partially
10 disabled employee is available. If the employer does not make this
showing, the employee is entitled to temporary total disability benefits.
(*Id.*, at p. 422; *Transport Indem. Co. v. Ind. Acc. Com.* (1958) 157
Cal.App.2d 542, 546 [321 P.2d 21].)”

11 (*General Foundry Service v. Workers’ Comp. Appeals Board (Jackson)* (1986) 42 Cal.3d 331, 339, fn. 5
12 [51 Cal.Comp.Cases 375].)

13 Here, in various treatment reports during the period from June 3, 2015 through February 29,
14 2016, Dr. Green, the treating physician, stated that applicant “temporarily cannot work in his
15 department.” (see App. Exh 1.) In his Report the WCJ noted that although applicant was temporarily
16 partially disabled, defendant had not offered him any alternative employment and as such, applicant was
17 entitled to temporary disability benefits. (see Report, p. 16.)

18 The WCJ’s analysis with respect to this issue appears to be consistent with the statutory and case
19 law noted above. Again, we see no reason to disturb his decision.

20 Finally, regarding the EDD lien, in the Minutes of Hearing the WCJ stated that the EDD paid
21 benefits “according to their opening lien.” (September 9, 2016 Minutes of Hearing (MOH), p. 3.) In the
22 Opinion on Decision and the Report the WCJ noted that despite receiving notice of the mandatory
23 settlement conference and the trial, the EDD did not file any exhibits nor did it appear at the trial. Our
24 review of the trial transcript indicates that the WCJ’s statements that there was no evidence submitted
25 regarding actual payment of benefits by the EDD are accurate. We also note that at the trial defense
26 counsel stated, “[N]o evidence of their lien [the EDD lien] has been offered into evidence” (MOH, p.3)
27 and as the WCJ stated “EDD has not filed a Petition for Reconsideration, so EDD evidently does not

1 believe itself to be aggrieved.” (Report, p. 17.) Thus, there is no reason to disturb the WCJ’s decision
2 dismissing the EDD lien.

3 Accordingly, for the reasons stated in the Report and for the reasons discussed herein, we affirm
4 the F&A.

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1 For the foregoing reasons,

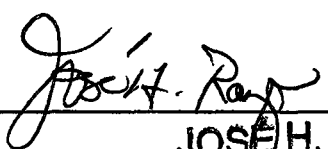
2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
3 Board that the Findings, Award and Order issued by the WCJ on November 29, 2016 is **AFFIRMED**.

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5 **WORKERS' COMPENSATION APPEALS BOARD**

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9 DEIDRA E. LOWE

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11 **I CONCUR,**

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15 **MARGUERITE SWEENEY**

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17 
18 **JOSE H. RAZO**



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20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21 **SEP 07 2017**

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

24 **TIMOTHY KIRBY**
25 **D' ANDRE, PETERSON, BOBUS & ROSENBERG**
26 **LAW OFFICE OF MARK GEARHEART**
EMPLOYMENT DEVELOPMENT DEPARTMENT

27 **TLH/abs**