WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JEFFREY FUJIMOTO, ***Applicant,*** **vs.** **CALIBER COLLISION CENTERS; HARTFORD ACCIDENT & INDEMNITY,** ***Defendants.***	**Case No. ADJ7897753** **(Van Nuys District Office)** **OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration of the January 9, 2014 Findings Of Fact & Order of the workers' compensation administrative law judge (WCJ) who found that applicant did not sustain industrial injury to his "psychological system" while working for defendant as a body technician during the period August 5, 2002 to September 21, 2010, and ordered that he take nothing on his claim.

Applicant contends that he met his burden of proving psychiatric injury, that the WCJ did not properly address the injury claim, and that the WCJ relied upon medical evidence that was not substantial in ordering that applicant take nothing.

An answer was received from defendant. The WCJ provided a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied. A transcript of the trial proceedings on November 13, 2013, was received.

We have carefully reviewed the record and considered the allegations of the Petition For Reconsideration and the WCJ's Report with respect thereto. For the reasons stated by the WCJ in his Report, which are incorporated by reference herein, and for the reasons below, we deny reconsideration and affirm the January 9, 2014 Findings Of Fact & Order.

The burden of proof rests on the party holding the affirmative of an issue. (Lab. Code, § 5705.) In this case, applicant claimed that he incurred psychiatric industrial injury and he had the burden of proving that injury. To meet his burden, applicant was obligated to prove each fact supporting his claim

by a preponderance of the evidence. " 'Preponderance of the evidence' means that evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth..." (Lab. Code, § 3202.5.) The threshold of proof for the industrial causation of disease or disability requires a showing of more than a mere possibility. The applicant must show that "industrial causation is reasonably probable." (*McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692 [58 Cal.Comp.Cases 313].) Applicant did not meet his burden of proof in this case.

Applicant testified to several harassing events that allegedly occurred while he was employed at defendant's body shop as the source of his psychiatric condition. However, that testimony was the *only* evidence offered by applicant to prove that the alleged harassing events occurred. By contrast, several individuals identified by applicant as participating in the alleged harassment testified that the events did not occur as claimed by applicant. The WCJ concluded that applicant was not a credible witness and that he did not meet his burden of proof because other witnesses who were credible denied that the alleged events occurred. The WCJ's credibility determination is entitled to great weight because he had the opportunity to observe the demeanor of all of the witnesses when they testified at trial. (*Clendaniel v. Industrial Acc. Com.* (1941) 17 Cal.2d 659 [6 Cal.Comp.Cases 85]; *Garza v. Worker's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].)

The WCJ's determination that applicant is not a credible witness is further supported by the evidence that he made false statements about the actions of Myron Nathan, M.D., the Agreed Medical Evaluator (AME) who was selected to provide a psychiatric evaluation in this case. During his deposition on December 2, 2011, Dr. Nathan was read a portion of the transcript of applicant's earlier deposition by defense counsel. As shown by the deposition transcript, this led to the following testimony by Dr. Nathan:

> "Q [D]id you ever yell at him [applicant] during your evaluation?
>
> A Not that I recall.
>
> Q I took this applicant's deposition, Doctor, three volumes, about 10 hours. So I got to know him quite well...That is why I said we will talk

on the record about how I was told he does not want to see you again for a reevaluation. This is his deposition, volume III, that took place October 28th, 2011. And I said:

> 'Q I wanted to first start out, Jeff, with something that I heard. You do not want to go back to the AME doctor anymore, Dr. Nathan; is that correct ?
>
> A That's correct.
>
> Q Why is that?
>
> A He was very unprofessional. He yelled at me. He told me that I would never win this case because the insurance company has more money than I do. I had an anxiety attack, a panic attack in his office, and I thought that I was going to have a heart attack. My arms went numb. He yelled at me for quite a long time.
>
> Q How long?
>
> A Approximately 20 to 30 minutes, and that was very' - -
>
> A Let me stop you. This applicant is a goddamn liar. That never happened. You don't have to go on. That never happened." (9:5-10:13.)

Applicant was not credible in testifying about events that he alleged occurred at the workplace and caused him psychiatric injury. Applicant's testimony concerning those alleged events is not supported by other evidence, and his allegations were expressly rebutted at trial by other witnesses whose testimony was determined by the WCJ as credible. Applicant did not meet his burden of proving his claim of industrial psychiatric injury and the January 9, 2014 Findings Of Fact & Order is affirmed.

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For the foregoing reasons,

IT IS ORDERED that applicant's petition for reconsideration of the January 9, 2014 Findings Of Fact & Order of the workers' compensation administrative law judge is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Cristine E. Gondak DEPUTY

CRISTINE E. GONDAK

I CONCUR,

Deidra E. Lowe

DEIDRA E. LOWE

PARTICIPATING, BUT NOT SIGNING

RONNIE G. CAPLANE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APR 03 2014

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

JEFFREY FUJIMOTO
ROWEN GURVEY & WIN
ALBERT AND MACKENZIE
DAVID BERNS
EMPLOYMEN DEVELOPMENT DEPARTMENT
QBC
VANGUARD PSYCH

JFS/abs

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

WCAB Case No(s). ADJ 7897753

JEFFREY FUJIMOTO,	VS.	**CALIBER COLLISION CENTERS; HARTFORD ACCIDENT AND INDEMNITY,**
APPLICANT,		DEFENDANT(S).

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE
DAVID L. POLLAK FEBRUARY 4, 2014

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION

INTRODUCTION:

On February 3, 2014, the Applicant filed a timely and verified Petition for Reconsideration dated January 31, 2014, alleging that the undersigned WCJ erred in his Findings of Fact & Order dated January 9, 2014. The Applicant contends as follows:

1. That the gravity of the medical and testimonial evidence should have led the undersigned WCJ to conclude that the Applicant did sustain a compensable injury to his psychological system; and

2. That the undersigned WCJ erred in obtaining a supplemental report from the Agreed Medical Evaluator (AME).

STATEMENT OF FACTS:

The Applicant, while employed as a body technician for Caliber Collision Centers, claimed to have sustained industrial injury during the period August 5, 2002 to September 21, 2010 to his psychological system.

The parties agreed to use Myron L. Nathan, M.D., as the AME in this case. In his deposition dated December 2, 2011, [Defendant's Exhibit "B"] on page 8 at lines 14 to 18, Dr. Nathan attributed 90% apportionment of the causation of the Applicant's psychological injury to work-related stress.

On December 28, 2012, this case initially came before the undersigned WCJ for trial. On that day, the undersigned WCJ ordered the matter off calendar and issued the following discovery order:

> "The parties are ordered to obtain a definitive report from Myron Nathan, M.D., the AME, regarding factors of causation pursuant to [Rolda v. Pitney Bowes. Inc. (2001) 66 Cal. Comp. Cases 241, 247 (Appeals Board en banc)]."

The parties subsequently obtained two supplemental reports from Dr. Nathan. In his first supplemental report dated December 22, 2012, [Defendant's Exhibit "C"] on pages one to two, Dr. Nathan wrote the following:

> "It is noted in the Rolda case there is a four step analysis to determine whether or not a psychiatric injury is compensable or to be barred by Labor Code [§] 3208.3(b) as having been caused by a lawful, nondiscriminatory personnel action. The determination that must be made as to the actual events of the employment is a legal determination that is deferred to the trier of fact. However, the determination establishing the actual events of employment as being the predominant cause is a medical decision. I can state with reasonable medical probability it was the actual events of employment of the applicant's employment that were predominant in regard to the applicant's injury to his psyche.
>
> It is then to be determined by the trier of fact whether any of the actual employment events or the personnel actions were lawful, nondiscriminatory and in good faith. If the trier of facts [sic] determined the personnel actions were lawful, nondiscriminatory and in good faith, then it would be my opinion the applicant did not sustain a work-related injury, however the converse would be true.
>
> The fourth part of the Rolda Decision requires a medical determination as to whether or not the personnel actions were the substantial cause, i.e., 35-40% of the psychiatric injury. Perhaps I have misunderstood what you are asking for. In my report given the numerous examples which the applicant cited as described in the History of Individual Injury section of my report which are clearly spelled out, I did not conclude these were personnel actions. Therefore, I did not defer this issue to the trier of fact."
>
> Therefore I am puzzled why I am being asked to comment upon the issue of Rolda."

In his second supplemental report dated January 22, 2013, [Defendant's Exhibit "D"] on page five, Dr. Nathan wrote the following:

> "I would urge the trier of fact, no matter what decision they may reach, no matter how credible they may consider the applicant in regard to describing the events of his employment, to take in consideration the applicant's total lack of credibility in regard to his description of what transpired at the time of my examination. Under no circumstances would I suggest the trier of fact consider this applicant to be one hundred percent credible and reliable."

This case returned to the undersigned WCJ for trial again on November 13, 2013. At the trial, the Applicant claimed various work-related stressors as set forth in his sworn testimony as follows:

> "The Applicant alleged daily work-related harassment causing him to sustain psychological injury. He believed that he was harassed because he was married to a Hispanic woman and had children. His was told by David Arguetta, a detailer and co-worker, that "Only Latino people should marry Latino people."
>
> Co-workers Dario Hernandez and Miguel Pelacios had placed dead rats on top of the Applicant's tool box. He was told by them that "Chinese people eat dogs and cats."
>
> Co-workers Ruben Hernandez and Mr. Arguetta drilled a hole in the men's restroom and threaded a snake camera through it to watch the Applicant urinate. They taped the snake camera screen with a camera phone and uploaded it to a website and caught them watching it on a computer.
>
> The Applicant contacted the FBI over this issue, who referred him to the Los Angeles Police Department, who referred him to the EEOC.
>
> Also, in the men's restroom, the Applicant saw a drawn image on the inside of the men's stall of a Chinese man performing fellatio with the phrase "mamón chino." When the Applicant reported this to the regional manager, it was scrubbed off.
>
> Co-workers Dario Hernandez, Miguel Pelacios, Bernie Rincon and David Arguetta, would walk around the Applicant's area in a conga-line with bottles of water pretending to urinate onto the floor making the floor wet.
>
> The Applicant complaints led to an internal investigation that ultimately cleared the company. He believed that the investigator was biased in favor of the company.
>
> The Applicant's direct supervisor, Ray Mablojian, made a duplicate key of the Applicant's vehicle and had installed a tape recorder in there.
>
> The Applicant also claimed that his vehicle, locked in an employee parking area, had its engine damaged causing him to rebuild it. Also, his vehicle had been intentionally scratched and that screws were intentionally drilled into the sidewall of his tires causing them to go flat."[1]

[1] Minutes of Hearing and Summary of Evidence, November 13, 2013, on page 4 at lines 9 to 24 to page 5 at lines 1 to 7.

The only allegation that was confirmed to be true by the Defendant's witnesses was the allegation of obscene graffiti on the men's room wall. As set forth in the testimony of David Argueta, a detailer employed by the Defendant:

> "Mr. Argueta did admit there was some obscene graffiti in the men's room concerning a Chinese man performing fellatio. He complained about it and had it removed."[2]

In addition, as set forth in the testimony of Dario Hernandez, a painter employed by the Defendant:

> "There was obscene graffiti of a Chinese man performing fellatio, but the graffiti was removed. It was up for three days. The men's room was only open to employees, but was not locked."[3]

After submission of the case, on November 18, 2013, the undersigned WCJ issued his order vacating submission and noticed his intention to submit a request for a supplemental report to Dr. Nathan to further develop the record pursuant to Rolda. In his letter dated December 3, 2013, the undersigned WCJ wrote the following to Dr. Nathan:

> "[P]lease provide a supplemental report that describes in detail, in accordance with Rolda, all the workplace and all the non-industrial related events and/or issues that combined caused the Applicant's psychological injury. You are then to assign a percentage of causation separately to each individual work-related and/or non-industrial event(s) and/or issue(s) that, when combined, equal 100% of the causation of the Applicant's psychological injury. **You are not to combine percentages as to any multiple factors and/or issues, either industrial or non-industrial**.
>
> It will ultimately be up to me to decide which workplace activities are actual events (i.e., which of the event(s) described by the Applicant happened or not) and whether those events that I have deemed to be actual events are otherwise legitimate, non-discriminatory, good faith personnel actions. Based on this, I can determine if the actual events of employment, if added together, will result in them being the predominant cause (i.e., more than 50%) of the Applicant's psychological injury and, whether those actual causes were substantially caused (i.e., 35% to 40%) by lawful, nondiscriminatory, good faith personnel actions.
>
> Your discussion should follow of the following format:
>
> [Employment Event #1] – [Percentage of Causation]

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[2] Minutes of Hearing and Summary of Evidence, November 13, 2013, on page 8 at lines 4 to 6.
[3] Minutes of Hearing and Summary of Evidence, November 13, 2013, on page 9 at lines 12 to 14.

[Employment Event #2] – [Percentage of Causation]
[Non-industrial Factors and/or Events #1] – [Percentage of Causation]
[Non-industrial Factors and/or Events #2] – [Percentage of Causation]
Total: 100%"

Dr. Nathan, in his report dated December 6, 2013, [WCAB Exhibit "A"] on pages two to three, in response to the undersigned WCJ's correspondence, provided the following factorial percentage analysis of causation of the Applicant's psychological injury:

"1. Dave Argata informed the applicant that Latinos should only marry Latinos. He talked about the applicant to other Hispanic employees. He informed him that his work was not very good and he should not have a Hispanic girlfriend: 0%.

2. The tires of his car being flattened and scratches being placed on his car: 4%.

3. Employees walking around making their eyes look slanted and mocking the applicant's race, rats being placed in his tool box, and his being given a present of a dead rat and the employees smiling: 4%.

4. Graffiti drawn on the walls of a Chinese man sucking a penis: 4%.

5. Ray, the manager, asking for the keys to his mini-van between 2007 and 2010. A tape was placed in his mini-van by an unknown party and he was recorded singing to his son. The employees subsequently sat around and laughed while they listened to the recording. In addition to his having to replace the engine in his mini-van: 4%.

6. Some unknown individual tampering with his tool box and his finding his tools not in order: 4%.

7. The applicant's belief that his tooth brush was tampered with and smelled funny: 4%.

8. Between January and March, 2010, he is recorded on film by Dave Argata and Ruben Mendoza in the bathroom urinating and defecating, and this film being shown on the Internet: 54%.

9. In September, 2010, Bernie Rincon stood behind him pretending he was urinating on him and he asked him if he wanted to fight: 4%.

10. Following this event, the applicant was sent home along with Bernie Rincon by the Ray, the manager. However, the applicant learned that Bernie Rincon was not actually sent home: 4%.

11. The investigator who investigated these above events was found not to be impartial by the applicant: 4%.

12. The applicant brought with him to his employment his psychopathology as manifested by his passive-dependent personality traits: 10%.

13. Employment events: 90%. Nonindustrial factors: 10%."

On December 17, 2013, the undersigned WCJ issued his order admitting Dr. Nathan's supplemental report and issued his notice of intention to submit the matter.

Having received no objection to the undersigned WCJ's notice of intention to submit the matter for decision, the undersigned WCJ issued his Findings of Fact & Order and Opinion on Decision dated January 9, 2014, finding that, in accordance with Labor Code § 3208.3(b)(1) and Rolda, that the Applicant did not sustain industrial injury to his psychological system. The undersigned WCJ determined that the only "actual event" was the obscene graffiti on the men's room wall constituting only 4% of the causation of the Applicant's psychological injury.

DISCUSSION:

GRAVITY OF THE EVIDENCE

The Applicant first contends that the gravity of the medical and testimonial evidence should have led the undersigned WCJ to conclude that the Applicant did sustain a compensable psychological injury.

A WCJ is not compelled to blindly accept the testimony of any witness deemed to be untruthful given that he or she is the ultimate finder of fact and is entitled to make his or her own credibility determinations. [Garza v. Workmen's Comp. Appeals Bd. (1970) 35 Cal. Comp. Cases 500, 505] While the WCAB may reject the findings of a WCJ and enter its own findings on the basis of its review of the record, [Labor Code § 5907] when a WCJ's findings are supported by solid, credible evidence, they are to be accorded great weight and should be rejected only on the basis of contrary evidence of considerable substantiality. [Lamb v. Workers' Comp. Appeals Bd. (1974) 39 Cal. Comp. Cases 310, 314]

In addition, if an AME has been chosen by the parties and is deemed substantial evidence, a WCJ must rule consistent with the findings of that physician. [Power v. Workers' Comp. Appeals Bd. (1986) 51 Cal. Comp. Cases 114, 117]

Pursuant to Labor Code § 3208.3(b)(1), in order to establish that a psychological injury is compensable, an injured worker must show by a preponderance of the

evidence that actual events of employment predominantly caused the psychological injury.

Also, pursuant to Labor Code § 3208.3(h), an injured worker will be barred from receiving compensation for stress and/or any physiological manifestations substantially caused by legitimate, good faith, personnel actions. [County of San Bernardino v. Workers' Comp. Appeals Bd. (McCoy) (2012) 77 Cal. Comp. Cases 219, 221]

The multilevel analysis to establish compensability for claims of injury based on personnel actions, in accordance with Rolda v. Pitney Bowes. Inc. (2001) 66 Cal. Comp. Cases 241, 247 (en banc), is as follows:

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

(2) if so, whether such actual events were the predominant cause (i.e., accounting for 51% or more) of the psychological 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 action were a "substantial cause" (i.e., accounting for at least 35% to 40%) of the psychological injury, a determination which requires medical evidence.

A "personnel action" is action by or attributable to the employer, if done by one whom has authority over the injured employee, in managing its business that includes but is not limited to reviewing, criticizing, demoting, or disciplining the injured worker. [Larch v. Contra Costa County (1998) 63 Cal. Comp. Cases 831, 833] As set forth in City of Oakland vs. Workers' Comp. Appeals Bd. (Cullet) (2002) 67 Cal. Comp. Cases 705, 709:

> "[T]he Legislature's 'good faith personnel action' exemption is meant to furnish an employer a degree of freedom in making its regular and routine personnel decisions (such as discipline, work evaluation, transfer, demotion, layoff, or termination). If a regular and routine personnel decision is made and carried out with subjective good faith and the employer's conduct meets the objective reasonableness standard, [§] 3208.3's exemption applies." (footnote excluded)

Finally, an injured worker's subjective misperception of harassment will not constitute actual events of employment. [See Verga v. Workers' Comp. Appeals Bd. (2008) 73 Cal. Comp. Cases 63, 72 (the WCAB found that an applicant's subjective misperception of harassment based on the disdainful reaction of her co-workers to her mistreatment of them by being rude, inflexible, easily upset, and demeaning toward them was found not to constitute actual events of employment; see also

Oliver v. Astrazeneca PLC (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 529 (Appeals Board noteworthy panel decision) (the WCAB found that remedial actions taken by an applicant's supervisor to correct the applicant's inappropriate and abusive behavior toward her co-workers was misperceived by the applicant as stress-inducing harassment and did not constitute actual events of employment)]

In this case, as set forth by the undersigned WCJ in his Opinion on Decision dated January 9, 2014, on page two:

> "[B]ased on the Supplemental Agreed Psychiatric Report of Myron L. Nathan, M.D., dated December 6, 2013, [WCAB Exhibit "A"] the Applicant's claim of industrial injury to his psychological system was a combination of 12 employment events constituting 90% of the causation and his passive-dependent personality trait constituting 10% of the causation.
>
> Having reviewed all of Dr. Nathan's reports and considering the Applicant's lack of credibility in his testimony, the undersigned WCJ cannot conclude that any of the Applicant's claimed employer actions, except the graffiti drawn on the walls of the men's restroom of a Chinese man performing fellatio, are 'actual events.' Instead, the undersigned WCJ found, based on the testimony of the Defendant's witnesses, the Applicant's co-workers David Argueta and Dario Hernandez, that the only 'actual event' was the obscene graffiti drawn on the restroom walls. This "actual event" cannot be considered any business decision that could constitute a lawful, nondiscriminatory, good faith personnel action. However, this actual event only constituted 4% of the causation of the Applicant's psychological injury.
>
> Therefore, given the lack of predominate causation being due to 'actual events' of employment, the Applicant cannot be deemed to have suffered an industrial psychological injury."

Notwithstanding the Applicant's critical characterizations to the contrary, the undersigned WCJ did not find any of the Applicant's allegations, other than his testimony of the obscene graffiti on the men's room wall, to be credible. The Applicant's expressed dissatisfaction with the undersigned WCJ's credibility determination and professed desire for an alternative credibility determination is not sufficient evidence of considerable substantiality to constitute a basis to reverse him. Ultimately, having heard the Applicant's testimony and independently determining that all but one of his expressed work-related stressors were both facetious and delusional on their face, the undersigned WCJ concluded that the Applicant was patently dishonest in his testimony and could not reasonably be believed.

Therefore, the Applicant did not provide any contrary evidence of considerable substantiality that would constitute a basis for reversible error.

DEVELOPMENT OF THE RECORD

The Applicant next contends that the undersigned WCJ should not have attempted to develop the record by seeking further supplemental reporting from Dr. Nathan.

Pursuant to Labor Code §§ 5701 and 5906, a WCJ may not leave undeveloped matters requiring further evidence [Kuykendall v. Workers' Comp. Appeals Bd. (2000) 65 Cal. Comp. Cases 264, 269] and has the authority to order the parties to obtain supplemental medical reports based on a WCJ's duty to develop the record. [Tyler v. Workers' Comp. Appeals Bd. (1997) 62 Cal. Comp. Cases 924, 928] However, in order to avoid circumventing the clear legislative intent to close discovery at the mandatory settlement conference in accordance with Labor Code § 5502(d)(3), before the medical record can be augmented, a WCJ must establish that the existing medical record is deficient and that a decision cannot be made on the existing record alone. [McDuffie v. Los Angeles County Metropolitan Transit Authority (2002) 67 Cal. Comp. Cases 138, 141 (Appeals Board en banc); see Rivas v. Posada Whitter/Berg Senior Services (2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 384, 15-17 (Appeals Board noteworthy panel decision)]

In this case, given that the record required development at the December 28, 2012 trial and, after the matter was submitted at the second trial setting on November 13, 2013, Dr. Nathan still failed to provide a proper analysis pursuant to Rolda, the undersigned WCJ had no other choice but to direct his own correspondence to Dr. Nathan for further supplemental reporting. The Applicant's after-the-fact realization that the supplemental report would not be beneficial to him does not now give him the right to claim to be aggrieved by Dr. Nathan's supplemental report when the Applicant received a decision that he did not like.

Therefore, the undersigned WCJ did not err in requesting Dr. Nathan to provide a further supplemental report.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that the Applicant's Petition for Reconsideration dated January 31, 2014 be denied.

Date: **February 4, 2014**

DAVID L. POLLAK
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Filed and Served by mail on all parties
on the Official Address Record.

By: Thelma Martinez
Dated: February 4, 2014