WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHAKE KHACHATRIAN, ***Applicants,*** **vs.** **STATE OF CALIFORNIA ATTORNEY GENERAL'S OFFICE, CALIFORNIA DEPARTMENT OF JUSTICE, Legally Uninsured, Adjusted by STATE COMPENSATION INSURANCE FUND,** ***Defendants.***	**Case No. ADJ10908110** **(Marina Del Rey District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

In order to further study the factual and legal issues in this matter, on August 24, 2018, we granted defendant's Petition for Reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact of June 7, 2018, wherein it was found that the "Labor Code section 5402 presumption of compensability does apply to the Labor Code section 3208.3(h) defense of lawful, non-discriminatory good faith personnel action in this case," and that, "Any evidence or witness testimony that could have been obtained with reasonable diligence within 90 days of the filing of the claim shall be excluded." In this matter, applicant claims that while employed as a legal secretary during a cumulative period ending on September 8, 2016, he sustained industrial injury to his psyche, brain, head, and in the form of headaches. In this matter, the parties have stipulated that defendant did not deny liability for the claimed injury within 90 days of defendant's receipt of applicant's DWC-1 claim form, and that applicant's injury is therefore presumed compensable pursuant to Labor Code section 5402(b). This presumption "is rebuttable only by evidence discovered subsequent to the 90-day period." This has been interpreted to mean that the defendant may rebut the presumption only with evidence that could not have been obtained with the exercise of reasonable diligence within the initial 90-day period. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Welcher)* (1195) 37 Cal.App.4th 675, 683-684 [60 Cal.Comp.Cases 717].)

Defendant contends that the WCJ erred in limiting defendant to evidence that could have been obtained within 90-days of submission of the DWC-1 claim form. Defendant argues that evidence that an applicant's psychiatric injury was substantially caused by lawful, nondiscriminatory personnel actions (Lab. Code, § 3208.3, subd. (h)) falls outside the scope of the Labor Code section 5402(b) presumption. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will rescind the Findings of Fact of June 7, 2018 and return this matter to the trial level so that the defendant may try the good faith personnel action defense utilizing all competent evidence, regardless of whether it could have been reasonably obtained within 90-days of receipt of the DWC-1 claim form. We hold that evidence of the good faith personnel action defense is exempt from Labor Code section 5402(b) presumption.

Labor Code section 3208.3, subdivisions (c), (d) and (h) state as follows:

> (c) It is the intent of the Legislature in enacting this section to establish a new and higher threshold of compensability for psychiatric injury under this division.
>
> (d) Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition. [...]
>
> ***
>
> (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.

In *James v. Workers' Comp. Appeals Bd.* (1997) 55 Cal. App. 4th 1053, 1055 [62 Cal. Comp. Cases 757], the Court of Appeal held that "the provisions of section 5402 do not apply to employees claiming psychiatric injuries who have been employed for less than six months where the injury is not caused by a sudden and extraordinary employment incident." Thus, the *James* court held that, even in cases where the section 5402(b) presumption would otherwise apply, a defendant may still prove that

applicant was employed for less than six months and the injury was not caused by a sudden an extraordinary employment incident, even if that evidence could have been reasonably obtained within 90-days of the filing of the claim form.

In coming to its holding, the *James* court relied upon the intent of the Legislature in establishing a "higher threshold of compensability for psychiatric injury" as codified in subdivision (c) and in the "Notwithstanding any other provision" phrase opening subdivision (d). The *James* court affirmed the WCJ and the Appeals Board which had held that the "Notwithstanding any other provision" phrase in subdivision (d) as overriding any other statute in the Labor Code, including the Labor Code section 5402(b). Thus, notwithstanding any other provision, including section 5402(b), psychiatric injuries occurring in the first six months of employment are not compensable. As the *James* court notes, section 3208.3(d) which was enacted after section 5402 "created an exception to section 5402." (*James*, 55 Cal.App.4th at p. 1056.)[1]

Noting the similarity between the opening phrase of section 3208.3(d) and subdivision (h)'s opening phrase that "[n]o compensation under this division shall be paid ... if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action[,]" we follow the *James* Court's reasoning and conclude that when a psychiatric injury is presumed compensable under section 5402(b), defendant is not precluded from asserting and presenting evidence on the good faith personnel action defense under section 3208.3(h), regardless of when the evidence was reasonably obtainable. This conclusion is consistent with the legislative intent of section 3208.3 as described in subdivision (c), which is "to establish a new and higher threshold of compensability for psychiatric injury *under this division*." (Italics added.) Division Four of the Labor Code includes both section 3208.3 and section 5402.

Based on a similar analysis as outlined above, Appeals Board panels in *Insalaco v. Workers' Comp. Appeals Bd.* (1999) 64 Cal. Comp. Cases 1407 (writ den.) and in the recent *Carrasco v. Cal. Dept. of Corrections and Rehab.* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 398 (Appeals Bd. panel) also held that section 5402(b) does not preclude evidence supporting the good faith personnel action defense,

[1] The Labor Code section 5402 was subsequently reorganized and the presumption was placed in subdivision (b), but the changes were not substantive vis-à-vis the presumption.

regardless of when that evidence was obtainable. We agree with *Insalaco* and *Carrasco, supra*, and therefore rescind the WCJ's decision and return this matter to the trial level for further proceedings and new decision by the WCJ, including but not limited to further development of the record and a determination on the merits of the good faith personnel action defense under section 3208.3(h). Other than our conclusion that the presumption of compensability of the psychiatric injury under section 5402 does not preclude defendant from asserting and presenting evidence on the good faith personnel action defense, we express no final opinion on any substantive issue. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided by Labor Code sections 5900 et seq.

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For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact of June 7, 2018 is hereby **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

JOSÉ H. RAZO

I DISSENT. (See Attached Dissenting Opinion.)

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 0 6 2019

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

HINDEN & BRESLAVSKY
SHAKE KHACHATRIAN
STATE COMPENSATION INSURANCE FUND

DW:oo

DISSENTING OPINION OF COMMISSIONER MARGUERITE SWEENEY

I respectfully dissent. As explained below, the evidentiary rules set forth in Labor Code section 5402(b) are applicable to the good faith personnel action defense. (Lab. Code, § 5402, subd. (h).) I would have denied the defendant's Petition for the reasons stated in the WCJ's Report and Recommendation on Petition for Reconsideration and for the additional reasons stated below.

Labor Code section 5402(b) states, "If liability is not rejected within 90 days after the date the [DWC-1] claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period." "The purpose behind the enactment of the section 5402(b) presumption was 'to expedite the entire claims process in workers' compensation by limiting the time during which investigation by the employer of a claim by an injured worker could be undertaken—90 days—without being penalized for delay. The 'penalty' provided for delay was that a rebuttable presumption of compensability would attach to the claim.'" (*Honeywell v. Workers' Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24, 34 [70 Cal.Comp.Cases 97], quoting *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Welcher)* (1995) 37 Cal.App.4th 675, 682 [60 Cal.Comp.Cases 717].)

Section 5402(b) therefore creates an evidentiary presumption and limits the evidence that can be used to dispute a claim. Evidentiary rules, including presumptions, are generally considered procedural rather than substantive. (See generally *Lozano v. Workers' Comp. Appeals Bd.* (2015) 236 Cal.App.4th 992 [80 Cal.Comp.Cases 407].)

Based on *James v. Workers' Comp. Appeals Bd.* (1997) 55 Cal. App. 4th 1053, 1055 [62 Cal. Comp. Cases 757], my colleagues in the majority have held that the substantive rules for proving and defending against claims of psychiatric injury in Labor Code sec. 3208.3 impliedly modified the procedural rules set forth in Labor Code section 5402(b). Of course, we cannot "presume that the Legislature intends, when it enacts a statute, to overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1325 [72 Cal.Comp.Cases 565].) Nothing in Labor Code section 3208.3 clearly expresses any intention to alter the evidentiary rules of Labor Code section 5402. Nor is invalidating section

5402(b) in psychiatric cases necessarily implied by any provision in section 3208.3.

Indeed, taking the *James* court's holding that the "notwithstanding any other provision of this division" phrase in Labor Code section 3208.3(d) trumps the procedural provisions of Labor Code section 5402(b) to its logical conclusion, there is no reason to hold that psychiatric injuries are immune from other procedural defenses. Thus, taking *James* to its logical conclusion, since psychiatric injuries taking place within the first six months of employment are not compensable "notwithstanding any other provision," it would follow that a defendant could introduce evidence regarding the Labor Code section 3208.3(d) defense even if the issue was not raised and evidence was not disclosed at the mandatory settlement conference as required by section 5502(d)(2), or that a defendant could reopen a finding of psychiatric injury to assert the Labor Code section 3208.3(d) defense, notwithstanding the good cause requirements of section 5803 or the time limits of section 5804. Of course, such a reading of "Notwithstanding any other provision..." opening of section 3208.3(d) is absurd. Clearly, the Legislature meant that notwithstanding any other *substantive* provision, psychiatric injuries sustained within the first six months of employment were not compensable unless they were caused by a sudden and extraordinary employment condition. Nothing in section 3208.3 was intended to alter the evidentiary or procedural rules attaching to workers' compensation proceedings, including the presumption and evidentiary rules imposed by section 5402(b).

Of course, even though I believe *James* was wrongly decided, I am constrained to follow it. As an "inferior court," we are "jurisdictionally required to adhere to and follow the decisions" of courts of superior jurisdiction. (*Brannen v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 377, 384, fn. 5 [61 Cal.Comp.Cases 554].) However, *James* held only that the section 5402(b) presumption does not apply to six-month rule of subdivision (d) of section 3208.3, and made no mention at all of the good faith personnel defense set forth in subdivision (h). In any case, *James* relied on the specific "notwithstanding any other provision" language of subdivision (d) which does not appear in subdivision (h). As the Supreme Court has cautioned, "A decision 'is not authority for everything said in the ... opinion but only "for the points actually involved and actually decided."' [Citations.] '[O]nly the ratio decidendi of an appellate opinion has precedential effect ....' [Citations.] Thus, 'we must view with caution seemingly

categorical directives not essential to earlier decisions and be guided by this dictum only to the extent it remains analytically persuasive.' [Citation.]" (*People v. Mendoza* (2000) 23 Cal.4th 896, 915.)

Accordingly, I would not extend *James* to make the Labor Code section 5402(b) presumption inapplicable to the lawful good faith personnel action defense.[2] Although there is no doubt that in enacting section 3208.3 the Legislature intended to make proving psychiatric injury more difficult and defending against claims of psychiatric injury less burdensome, this is amply accomplished by the substantive provisions of section 3208.3 itself. It is not logical or fair that generally applicable procedural provisions of the Labor Code outside of section 3208.3 should also be vitiated in the employer's favor. The majority's interpretation nullifies the purpose behind Labor Code section 5402, to expedite the claims process, and give the injured worker a prompt resolution to his or her claim.

Accordingly, I would have denied defendant's Petition. I therefore respectfully dissent.

MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 0 6 2019

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

HINDEN & BRESLAVSKY
SHAKE KHACHATRIAN
STATE COMPENSATION INSURANCE FUND

DW:oo

[2] For the reasons expressed herein, I decline to follow the nonbinding panel decisions cited by the majority.

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHAKE KHACHATRIAN, ***Applicant,*** **vs.** **STATE OF CALIFORNIA, ATTORNEY GENERAL'S OFFICE, CALIFORNIA DEPARTMENT OF JUSTICE, legally uninsured, adjusted by STATE COMPENSATION INSURANCE FUND,** ***Defendants.***	**Case No. ADJ10908110** **(Marina del Rey District Office)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION**

Reconsideration has been sought with regard to the decision filed on June 7, 2018.

Taking into account the statutory time constraints for acting on the petitions, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

For the foregoing reasons,

IT IS ORDERED that Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above case, all further correspondence, objections, motions, requests and communications *relating to the petitions* shall be filed only with the Office of the Commissioners of the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102) or its Post Office Box address (P.O. Box 429459, San Francisco, CA 94142-9459), and shall *not* be submitted to the district office from which the WCJ's decision issued or to any other district office of the Workers' Compensation Appeals Board, and shall *not* be e-filed in the Electronic Adjudication

Management System (EAMS). Any documents relating to the petitions for reconsideration lodged in violation of this order shall neither be accepted for filing nor deemed filed.

All trial level documents not related to the petition for reconsideration shall continue to be e-filed through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper form.[1] If, however, a proposed settlement is being filed, the petitioners for reconsideration should promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

MARGUERITE SWEENEY

CONCURRING, BUT NOT SIGNING

JOSÉ H. RAZO

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 24 2018

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

SHAKE KHACHATRIAN
HINDEN & BRESLAVSKY
STATE COMPENSATION INSURANCE FUND
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[1] Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g., petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements, etc.)

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ10908110

SHAKE KHACHATRIAN	**-vs.-**	**STATE OF CALIFORNIA ATTORNEY GENERAL S OFFICE; CALIFORNIA DEPARTMENT OF JUSTICE Legally Uninsured, Adjusted By SCIF INSURED FRESNO;**

. WORKERS' COMPENSATION JUDGE: **Elliot F. Borska**

DATE OF INJURY: **CT: 9/1/15 – 9/8/16**

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

I.
INTRODUCTION

1.	Applicant's Occupation	:	Legal Secretary
	Applicant's Age	:	32
	Date of Injury	:	9/1/15 to 9/8/16
	Parts of Body Injured		Psyche, brain (sleep) head, headache
	Manner in which injury occurred	:	Work activity
2.	Identity of Petitioner	:	**Defendant** filed the Petition.
	Timeliness	:	The petition is timely.
	Verification	:	The petition is verified.
3.	Date of Findings of Fact	:	June 7, 2018

4. Petitioner contends that the WCJ erred in finding that any evidence or witness testimony that could have been obtained with reasonable diligence within 90 days of the filing of the claim shall be excluded and that labor Code Section 5402 presumption of compensability does apply to the Labor Code Section 3208.3(h) defense of lawful non-discriminatory, good faith personal action in this case.

II.
FACTS

Applicant, Shake Khachtrian, claims to have sustained an injury to her psyche, brain (sleep), head and headaches during the period of 9/1/15 through 9/8/16. At the trial of May 23, 2018 the defendant stipulated that the denial of the claim was untimely. On June 7, 2018 the court made a Finding of fact that held that any evidence or testimony that could have been obtained with reasonable diligence within 90 days of the filing of the claim shall be excluded. The court also found that the Labor Code presumption of compensability undersection 5402 does apply, in this case, under these set of circumstances, to the defense of lawful, non-discriminatory, good faith personnel action pursuant to labor Code Section 3208.3(h). It is from these Findings that petitioner seeks reconsideration.

III.
DISCUSSION

Labor Code Section 5402 presumption of Compensability and the admissibly of evidence subject to Labor Code Section 5402

As noted in the case of Watts v. Workers Compensation Appeals Board, California Department Of Corrections, 69 Cal Comp Cases 687 (2004)

"In 1989 the Legislature amended section 5402 'to expedite the entire claims process in workers compensation by limiting the time during which investigation by the employer of a claim by an injured worker could be undertaken – 90 days – without being penalized for delay' (State Compensation Ins. Fund v Workers Comp Appeals Bd. 37 Cal. App.4th 675.682 [43 Cal Rptr. 2nd 660, 60 Cal. Comp. Cases 717](Welcher.) The amendment created a penalty for exceeding the 90 day investigative period by establishing a rebuttable presumption of compensability. 'The statute plainly states that if liability is not rejected within 90 days of the date of the claim filing, then the injury shall be presumed compensable.' Williams v Workers Comp. Appeals BD (1999) 74 Cal. App. 4th 1260 [88 Cal. Rptr. 2nd 798, 64 Cal. Comp. Cases 995]. As a presumption enacted as a matter of public policy, it places the burden of proving the employee does not have a compensable injury on the employer or carrier."

The court in Watts goes on to indicate that "Once the section 5402 presumption attaches to a claim 'at issue is what evidence may be admitted on behalf of the employer/carrier to rebut the presumption." (Welcher, supra, 37 Cal. App 4th at p. 683.)

As noted by the Court in State Compensation Ins. Fund v Workers Comp Appeals Bd. 37 Cal. App 4th 675; 43 Cal. Rptr. 2nd 660 (1995) "while the presumption of compensability will preclude the defendant from disputing its liability for injury with evidence which could have been obtained with the exercise of reasonable diligence within the initial 90 day period, the defendant is not thereafter permanently prevented from seeking evidence on a corollary and related issues. In short, Cal. Lab. Code Section 5402 presumption operates to bar the presentation of evidence that could have been obtained with the exercise of reasonable diligence." In Watts, supra at page 687, the court noted that " a finding of 'reasonable diligence' presents a factual question for the WCAB (Welcher, supra, 37 Cal.App. 4th at p. 683)."

In this case per the trial brief submitted by the defendant and in the informal discussions with the parties prior to the trial, it was anticipated that the witnesses listed by the defendant are co-workers and supervisors of the applicant who are expected to testify regarding events that transpired at work that go to the defense of lawful, non-discriminatory, good faith, personnel action. Additionally, all of the exhibits listed by the defendant in this case predate the date of the stipulated late denial on 1/9/17, except for the medical report from PQME Dr. Kharabi, which was admitted as a joint exhibit. The applicant offered the PTP reports from Dr. Thomas Curtis that were admitted into evidence without objection by defendant. Also admitted into evidence by the applicant, without objection, were the medical reports and records from Sharp Rees Stealy Occupational Health Services (Applicant's Exhibit 8). Included in that exhibit is the Doctors first report of Occupational Injury or Illness dated 9/22/16. In that report, which is stamped "Insurance Copy", the applicant gives a detailed history of bullying and harassment at work that were causing her stress. The doctor's diagnosis at that time was "alleged stress at work" and that the "work-relatedness – indeterminate". The plan was to refer the applicant to "psychiatry for an AOE/COE evaluation". This was not done at that time despite the very specific allegation made in this report re: her work stress. The applicant was terminated on 9/8/16.

Per Defendant's Trial Brief dated 5/22/18, it which the court took judicial notice per the request of defendant (See, MOH dated May 23, 2018 page 3 lines 16-18) the employer received the applicant's claim form on 9/16/16 but did not deny the claim until 1/9/17. It is anticipated that all of the defendant's witnesses will testify and attempt to refute all of the allegation made by the applicant and detailed in the medical reports. All of this investigation should have been done within 90 days of the receipt of the claim. The psychiatric medical- legal evaluation of the applicant, which was the recommended plan indicated by the doctor at Sharp Rees Stealy Occupational Health Services in the 9/22/16 report, was not done until 7/10/17 when the applicant was evaluated by PQME Dr. Kharabi (See Joint Exhibit A).

In this case, no determination regarding injury AOE/COE has been made. If at the time of submission of the case at a subsequent trial on that issue the court feels the need to further develop the record or finds that the medical reporting from the PQME is not substantial medical evidence, the court can further the record per *Tyler v. WCAB* (1997) 62 CCC 924, 928 and *McClune v. WCAB* (1998) 63 CCC 261. Based on the above, the court will preclude, in this case, any evidence or witness testimony that could have been obtained with reasonable diligence within 90 days of the filing of the claim.

LABOR CODE SECTION 5402 PRESUMPTION OF COMPENSIBILITY DOES APPLY IN THIS CASE TO THE LABOR CODE SECTION 3208.3(h) DEFENSE OF LAWFUL, NON-DISCRIMINATORY GOOD FAITH PERSONNEL ACTION

Petitioner cites only one case in support of their position that the good faith personnel defense allows evidence to be introduced at trial despite a late denial of a claim. The case cited is Insalaco v WCAB, Regents of the University of California (1999) 64 Cal. Comp. Cases 1407. This writ denied case is not controlling on this issue and the court is not bound by its findings.

In Insalaco the applicant's Petition for Reconsideration contended that since the injury was not denied within the statutory time frame per L.C. Section 5402 then evidence of the good faith personnel action available within the 90 day period should not have been admitted.

The WCJ in that case agreed with the applicant's contention that evidence reasonably discoverable within 90 days of notice of the claim of injury should not be used to rebut the presumption of the injury under Labor Code Section 5402.

In this case, the court has made no finding of injury AOE/COE. The only issue for the trial was Labor Code Section 5402 presumption of compensability and admissibility of evidence subject to Labor Code Section 5402 and the defendant's assertion that the presumption does not apply to the Labor Code Section 3208.3(h) defense. (See MOH dated May 23, 2018 page 2 lines 18-22.)

Petitioner cites a portion of the Insalaco case that noted that evidence that is inadmissible as a result of the 90 day rule are nevertheless admissible on "colollary and related issues." The cases cited in Insalaco and by petitioner dealt with threshold issues like employment, statute of limitations and the 6 month rule pursuant to Labor Code Section 3208.3(d). This court does not find that the issue presented herein are "colollary" or "related".

It is the court's opinion that if the defendants in this case are allowed to offer evidence that could have been discovered with reasonable diligence within the 90 days of the filing of the applicant's claim, then they are circumventing the legislative intent of Labor Code Section 5402 and rendering it toothless and without consequence.

DEFENDANT CONTENDS THAT APPLICANT'S PSYCHE CLAIM IS NOT COMPENSIBLE DUE TO THE GOOD FAITH PERSONEL DEFENSE

This court did not make any finding regarding the compensability of the applicant's claim as noted above, however, the court feels compelled to comment on the issue. The legislature enacted section 3202.3 of the Labor Code to establish a new and higher threshold of compensability for psychiatric injuries arising out of and in the course of employment. In order to establish that a psychiatric injury is compensable, an employee must demonstrate by a preponderance of the evidence that the actual events of employment were the predominant as to all causes combined of the psychiatric injury (Labor Code Section 3208.3(b)(1). The injury is not compensable if substantially caused by lawful, non-discriminatory, good faith personnel action. (Labor Code Section 3208.3(h).

A substantial cause means at least 35% to 40% of the causation from all sources combined. (Labor Code Section 3208.3(b)(3).

In this case, the substantial medical opinion from Panel Qualified Medical Examiner in Psychiatry, Dr. Fereidon Kharabi in his report dated 07/10/17, opined that "the predominant cause (or greater than 50%) for all causes combined, of the development of claimants psychiatric disorders was the emotional sequelae to the alleged hostile work environment characterized by bullying and harassment in the course of her employment with the State of California Attorney General's office, culminating in the date of injury July 11, 2016." (See, Joint Exhibit A.)

As far as the good faith personnel action of not passing probation and her eventual termination, the PQME found that they were "contributory to the development of her emotional disorders but did not reach the level of substantial or predominant cause" (See, Joint Exhibit A Report of Dr. Fereidon Kharabi at pages 29-40 and page 46.)

Therefore, should the court agree with defendants in finding that these actions of the State of California, Department of Justice were lawful, in good faith, and non-discriminatory, the applicant's claim may still be found to be compensable they were found not to be the predominant cause of this applicant's psychiatric injury, per the PQME as noted above.

Clearly, any evidence that defendant's would want to introduce re: the alleged and perceived hostile work environment, bullying, harassment, etc. that was the predominant cause of the applicant's psychiatric injury, per the PQME would be precluded under the Labor Code Section 5402 presumption if such evidence could have been obtained with the exercise of reasonable diligence within 90 days of the filing of the claim.

IV.
RECOMMENDATIONS

For the reasons stated above, it is respectfully recommended that the Petition for Reconsideration be denied.

DATE: 7/10/2018

Elliot F. Borska
WORKERS' COMPENSATION JUDGE

SERVED ON PARTIES LISTED BELOW:
HINDEN BRESLAVSKY LOS ANGELES, Email
SCIF INSURED FRESNO, US Mail
SCIF STATE EMPLOYEES LEGAL GLENDALE, US Mail
SHAKE KHACHATRIAN, US Mail
STATE OF CALIFORNIA ATTORNEY GENERALS OFFICE, US Mail
ON: 07/10/2018
BY:
Sharon King