

1 **WORKERS' COMPENSATION APPEALS BOARD**
2 **STATE OF CALIFORNIA**

3
4 **DENNIS STOLP,**

5 *Applicant,*

6 vs.

7 **CALIFORNIA DEPARTMENT OF**
8 **DEVELOPMENTAL SERVICES, SONOMA**
9 **DEVELOPMENTAL CENTER, administered**
10 **by STATE COMPENSATION INSURANCE**
11 **FUND,**

12 *Defendants.*

Case Nos. **ADJ8878235**
ADJ9233405
(Santa Rosa District Office)

ORDER DENYING
PETITION FOR
RECONSIDERATION

13 We have considered the allegations of the Petition for Reconsideration and the contents of the
14 report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our
15 review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we
16 will deny reconsideration.

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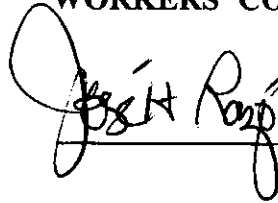
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1 For the foregoing reasons,

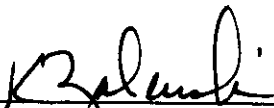
2 **IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

3 **WORKERS' COMPENSATION APPEALS BOARD**

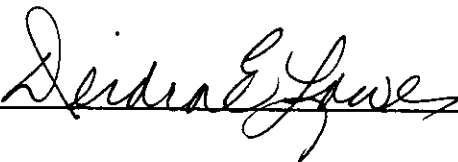
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6 **JOSÉ H. RAZO**

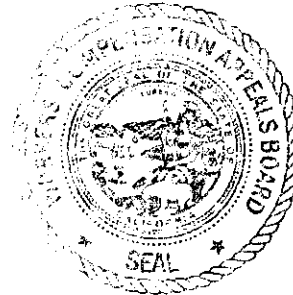
7 **I CONCUR,**

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11 **KATHERINE ZALEWSKI**

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14 **DEIDRA E. LOWE**



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

17 **AUG 25 2015**

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

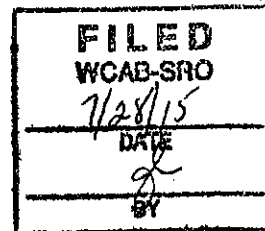
21 **DENNIS STOLP**
22 **MASTAGNI HOLSTEDT**
23 **STATE COMPENSATION INSURANCE FUND**



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27 **mm**

STOLP, Dennis

WORKERS' COMPENSATION APPEALS BOARD
OF THE
STATE OF CALIFORNIA



ADJ8878235 and ADJ9233405

DENNIS STOLP

vs.

STATE OF CALIFORNIA, DEPARTMENT OF
DEVELOPMENTAL SERVICES, SONOMA
DEVELOPMENTAL CENTER

JAMES R. JOHNSON
Workers' Compensation Judge

Dates of Injury: ADJ8878235 – 10/18/2012
ADJ9233405 – CT-12/17/2013

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

On February 23, 2015, the above cases came on calendar for a Mandatory Settlement Conference. At the hearing the parties filed a Pre-Trial Conference Statement in which they described the stipulations and issues and disclosed the identity of their witnesses and the exhibits to be offered at trial.

~~On March 25, 2015, the cases returned to calendar for a full-day trial. At the trial the parties~~
stipulated that Dennis Stolp, born _____ while employed as a peace officer (Occupational Group 490), by the State of California, Department of Developmental Services, Sonoma Developmental Center, on October 18, 2012 and during the cumulative period through December 17, 2013, claims to have sustained injury arising out of and in the course of employment to his cardiovascular system and psyche. The parties further stipulated that the applicant's injury to his

heart became permanent and stationary on April 16, 2014 and that the injury to the applicant's psyche became permanent and stationary on March 26, 2013.

At the trial the parties framed the issues to be decided as follows: Injury arising out of and in the course of employment; parts of body injured; temporary disability claimed for the period November 18, 2013 through November 19, 2013, February 23, 2014 through February 25, 2014, June 11, 2014, and June 15, 2014; permanent disability including apportionment; need for further medical treatment; liability for self-procured medical treatment; attorney's fees; the affirmative defense of a good-faith personnel action to the alleged injury to the psyche; and whether or not the applicant sustained a singular injury with compensable consequence or whether the applicant has sustained two separate injuries.

At the trial all of the offered exhibits were accepted into evidence except for Applicant Exhibit 1 for Identification Only, Applicant Exhibit 6 for Identification Only, and Defendant Exhibit F for Identification Only.

At the trial testimony was taken from the applicant, the applicant's supervisor, and four witnesses called on behalf of the employer. At the conclusion of the testimony, the parties were allowed 20 days to file Post-Trial Briefs and to advise as to any stipulation regarding the applicant's average weekly earnings at the time of the alleged injuries. The case was otherwise submitted for decision.

On April 15, 2015 the applicant's attorney filed a Post-Trial brief in which it was noted that applicant agreed with the wage information submitted by the defendant that applicant's average weekly wage in 2012 was \$1,032.69 based on a monthly salary of \$4,470 and that in 2013 the applicant's average weekly wage was \$1,052.77 based on a monthly salary of \$4,562.

On or about April 17, 2015 defendant's attorney filed a Post-Trial Brief.

On June 22, 2015 the parties were served with Findings and Orders by which it was determined that the applicant take nothing on the claims alleged in each case. In ADJ8878235 it was found that on October 18, 2012 the applicant sustained injury arising out of and in the course of employment to his psyche and cardiovascular system which caused permanent disability of 34% and need for further medical treatment to cure or relieve from the effects of the injury to his cardiovascular system. It was, however, further found that the applicant's injuries were substantially caused by a lawful, non-discriminatory, good faith personnel action and were therefore barred under the provisions of Labor Code section 3208.3. In ADJ9233405 it was found that during the cumulative period through December 17, 2013, the applicant did not sustain injury arising out of and in the course of employment to his heart or psyche.

On July 10, 2015 the applicant filed a Petition for Reconsideration on the grounds that the Workers' Compensation Judge (WCJ) acted without or in excess of his powers and the evidence does not justify the findings of fact.

On July 24, 2015 an Answer to Petition for Reconsideration was filed by the defendant.

II

DISCUSSION

In the Petition for Reconsideration the applicant argues that the WCJ's findings of fact are not justified by the evidence because defendant did not prove that the applicant's disciplinary action was lawful, non-discriminatory, or taken in good faith. The applicant further argues that the applicant's claim of cardiovascular injury is not governed by the Court of Appeal's holding in McCoy and that the WCAB should instead rely on the Lamb case and find the applicant's cardiovascular injuries to be compensable irrespective of the WCAB's determination of whether the applicant's injury to his psyche was the result of a good faith personnel action.

Based upon the trial testimony and the exhibits, it is found that on or about September 27, 2011, the applicant and another peace officer were sent by their supervisor, Commander Lewis, to make contact with a named staff member who was the subject of an anonymous tip alleging that the named staff member was "tasing patients" on a specific unit of the Sonoma Developmental Center. During the course of the applicant's contact with the named staff member, the applicant confiscated from the named staff member a "loaded hand gun" and a "Taser gun", but did not otherwise escort, detain, or arrest the named staff member. The applicant and the other officer returned to their office and informed their supervisor, Commander Lewis, about the contact and the confiscation of the two weapons. The named staff member was soon thereafter administratively removed from the campus. Subsequent investigations determined that 30 residents were found to have sustained "thermal burn" injuries but that the "Taser gun" confiscated by the applicant from the named staff member could not have caused these injuries.

On or about March 9, 2012, the Department's Chief of the Office of Protective Services, Corey Smith, at the direction of Deputy Director Flannery, requested Janet Swearingen to perform an internal affairs investigation of the case.

In April of 2012, "Cal Watch", an "independent journalistic organization" began a series of articles entitled "Broken Shield" which included an August 3, 2012 article which was critical of the department's handling of the "Taser incident."

On or about April 12, 2012, as part of the internal affairs investigation, the applicant was interviewed by Janet Swearingen.

On or about May 31, 2012, the internal affairs report was completed by Janet Swearingen.

On or about October 2, 2012, the applicant was served with a Notice of Adverse Action (Defendant Exhibit D) advising the applicant of a salary reduction of 10% for 12 pay periods on the grounds that his actions on September 27, 2011 demonstrated “ incompetency, inefficiency, inexcusable neglect of duty, willful disobedience, and other failure of good behavior either during or outside of duty hours which is of such nature that it causes discredit to the appointing authority or the person’s employment”.

On October 25, 2012, the applicant was served with a letter indicating that a Skelly hearing was held on October 24, 2012, and that the adverse action would be sustained. (See, Defendant Exhibit C).

On or about October 29, 2012, the applicant received treatment from Anne Kopp, PhD., for a diagnosed Adjustment Disorder with Depressed Mood. In her Doctor’s First Report of Injury; Dr. Kopp indicates that applicant was “hit hard “by the claims that he was “incompetent” and “neglectful of his duty” (See Applicant Exhibit 5).

On January 3, 2013, the applicant and the department reached a settlement of the applicant’s appeal of the adverse action (See, Defendant Exhibit A). Pursuant to the reports of Dr. Anderson and Dr. Lopez, it appears that this settlement shortened the applicant’s pay reduction from 12 months to 2 or 2 1/2 months.

On or about January 11, 2013, the applicant felt “weak and sweaty” and was found to be “tachycardic”. The applicant was told he had an “arrhythmia” and began receiving medical treatment. The applicant was referred to a cardiologist for further medical treatment (See, WCAB Exhibit 2, report of Dr. Anderson, dated April 21, 2014, at pages 4-5).

In the Petition for Reconsideration the applicant claims that the defendant’s personnel actions were not taken in “good faith” and were discriminatory because the investigation of the

incident of September 27, 2011, was not undertaken until six months after the incident; the investigation and discipline occurred after defendant received "bad press from a state government watchdog"; and, the disciplining of the applicant and other participants was based on policies not in effect on the date of the incident.

As noted in the Opinion on Decision, to be in "good faith" an employer's disciplinary action must be done in a manner that is lacking outrageous conduct, is honest and with a sincere purpose, is without an intent to mislead, deceive, or defraud and is without collusion or unlawful design. An employer's disciplinary actions short of termination may be considered personnel actions even if they are harsh and if the actions were not so clearly out of proportion to the employee's deficiencies so that no reasonable manager could have imposed such discipline (See, Larch v. Contra Costa County (1998) 63 CCC 831).

The defendant's delay in making an investigation into the incident and/or taking any disciplinary action against the employees involved in the September 27, 2011 incident does not render the employer's actions to lack "good faith". Based upon the factual history presented at the trial, the employer's investigation of the incident began on or about March 9, 2012 when Deputy Director Flannery requested that Janet Swearingen perform an internal affairs investigation of the incident. There is no evidence in the record that Ms. Swearingen's investigation was unreasonable or otherwise tainted by outside influences.

Also as noted in the Opinion on Decision, it was found that all of the employees involved in the September 27, 2011 incident, including supervisors and administrators, were subjected to "personnel actions". There is therefore no basis for concluding that the applicant was singled out discriminatorily for his participation in the incident.

As noted in the Opinion on Decision, the September 27, 2011 incident was of a "very serious nature" involving allegations that a named staff member was "tasing" residents. As stated in the Opinion on Decision it continues to be found that:

"...Based on the testimony of Janet Swearingen and Daniel Montoya the applicant's discovery that the named staff member was at work with a loaded hand gun and a Taser gun served to heighten the already serious nature of the incident. Based on the opinion of these witnesses the applicant should have taken additional action to detain the named staff member and should not have allowed the staff member to re-gain access to his work unit or have any potential further contact with the residents. The subsequent investigation finding that 30 residents were injured by "thermal burns" further serves to explain why the department performed an internal affairs investigation and the multiple personnel actions against the employees involved in the "Taser incident". These multiple personnel actions included the "self-demotion" of the Chief of the Office of Protective Services and the re-assignment of the Clinical Director. In light of the totality of the circumstances it is found that the personnel action taken against the applicant may have been "harsh" but it was not so clearly out of proportion to the applicant's deficiencies that no reasonable manager could have imposed the discipline in good faith."

In County of San Bernardino v. WCAB (McCoy) (2012) 77 CCC 219, the Court of Appeal found that in enacting section 3208.3 the Legislature made quite clear that it intended to limit claims for psychiatric injury due to their proliferation and the potential for fraud and abuse. Therefore, any interpretation of the section that would lead to more or broader claims should be examined closely to avoid violating express legislative intent.

The McCoy court further found that Labor Code section 3208.3(h) precludes recovery for physical manifestations that are directly and solely resulting from a psychological injury suffered as a result of "good faith personnel actions". The McCoy court found that any other result would undermine the purpose of the law to limit such claims because of their potential for fraud and abuse. Accordingly, the McCoy court held that a "good faith personnel action defense" precludes recovery for psychiatric injuries with resulting physiological manifestations solely caused by the stress from such actions.

Based upon the reports of the Agreed Medical Examiner Dr. Anderson (WCAB Exhibit 2), it was found that the injuries to the applicant's cardiovascular system were directly and solely caused by the psychological injury resulting from the defendant's lawful, non-discriminatory, good faith personnel action.

In his report dated May 13, 2014, Dr. Anderson concluded that the overall personnel action sequence suggested that applicant was accused of serious issues that led to secondary depression and anxiety and in the wake of these activities had hypertension probably due to increased sympathetic outflow, including increased secretion of epinephrine and norepinephrine. Dr. Anderson found that in the setting of this high stress level of high blood pressure, the applicant developed cardiac arrhythmia. Dr. Anderson found that causation of the applicant's hypertension was 40% industrial and the applicant's cardiac dysrhythmia was 80% industrially caused. (See, WCAB Exhibit 2, report of Dr. Anderson dated May 13, 2014 at page 19).

Based upon a review of the Petition for Reconsideration, it continues to be found that the Opinion on Decision fully supports the Findings and Orders and the Opinion on Decision is therefore adopted and incorporated herein, in part, as follows:

"Labor Code section 3208.3 was part of the 1989 Workers' Compensation Reform Act which passed in response to increased public concern about the high cost of workers' compensation coverage, limited benefits for injured workers, suspected fraud, and widespread abuses in the system and particularly the proliferation of workers' compensation cases with claims of psychiatric injuries. As a result the Legislature's expressed intent in enacting Labor Code section 3208.3 was to establish a new and higher threshold of compensability for psychiatric injury. The statute's "good faith personnel action" provision is meant to furnish an employer a degree of freedom when making 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, section 3208.2's exemption applies (See, City of Oakland v. WCAB (Gullet) (2002) 67 CCC 705).

Labor Code section 3208.3(h) states that 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 issues.

In Rolda v. Pitney Bowes, Inc. (2001) 66 CCC 241, the Appeals Board, En Banc, held that a multi-level analysis is required when a psychiatric injury is alleged and a lawful, nondiscriminatory, good faith, personnel action has been raised. First, the Workers' Compensation Judge (WCJ) must determine whether the alleged psychiatric injury involved actual events of employment and, if so, whether competent medical evidence establishes the required percentage of industrial causation. If these two conditions are met the WCAB 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% of the psychiatric injury.

In Rolda the Appeals Board cited with approval previous "Significant Panel Decisions" issued in Larch v. Contra Costa County (1998) 63 CCC 831 and Stockman v. State of California/Department of Corrections (1998) 63 CCC 1042.

In Larch and Stockman, the Board Panels addressed the elements of section 3208.3 including what constitutes a "personnel action", "good faith", "lawful and nondiscriminatory", and "substantial cause". The Appeals Board adopted the California Supreme Court's "objective reasonable standard" from the Cotran case which found in an employment termination case the question critical to defendant's liability was not whether the plaintiff in fact sexually harassed, but whether at the time the decision to terminate the plaintiff's employment was made, defendant, acting in good faith and following an investigation that was appropriate under the circumstances, had reasonable grounds for believing plaintiff had done so.

In Larch the Board Panel held that coupling "good faith" with "objectivity" is intended to place the trier of fact in the position of the "reasonable employer" in deciding whether the defendant in a wrongful termination suit acted responsibly and in conformity with prevailing social norms in deciding to terminate an employee for misconduct. Any analysis of the good faith issue therefore must look at the totality of the circumstances, not a rigid standard, in determining whether the action was taken in good faith. To be in good faith the action must be done in a manner that is lacking outrageous conduct, is honest and with a sincere purpose, is without an intent to mislead, deceive, or defraud and is without collusion or unlawful design. In Larch the Board panel further held that a "personnel action" includes but is not necessarily limited to a termination of employment. An employer's disciplinary actions short of termination may be considered personnel actions even if they are

harsh and if the actions were not so clearly out of proportion to the employee's deficiencies so that no reasonable manager could have imposed such discipline.

...Based upon a review of the trial record, including the testimony and the reports of Dr. Anderson and Dr. Lopez, it is clear that the applicant's alleged psychiatric injury involved actual events of employment which were a predominate cause of the applicant's psychiatric injury and that the personnel action, i.e. the Notice of Adverse Action, was a substantial cause of the psychiatric injury. It is further felt evident that the trial record establishes that the employer's investigation and subsequent Notice of Adverse Action were both lawful and non-discriminatory. The major issue that needs to be addressed is whether or not the personnel actions were made in "good faith."

Based upon a review of the trial record, including the trial testimony, it is found that on September 27, 2011, the applicant performed his duties within the expectations of his immediate supervisor Commander Lewis. The applicant further performed these duties in accordance with his understanding that the role of a peace officer at the Sonoma Developmental Center was to handle matters "administratively" and not to make incidents visible to the public. The applicant was allowed to remain in his position as Acting Sergeant and the adverse action was served on the applicant a year after the incident giving rise to the personnel action. In addition, the internal affairs investigator, Janel Swearingen, testified that she did not include a charge that the applicant was "incompetent."

However, the September 27, 2011 incident was of a very serious nature involving allegations that a named staff member was "tasing" residents. Based on the testimony of Janet Swearingen and Daniel Montoya the applicant's discovery that the named staff member was at work with a loaded hand gun and a Taser gun served to heighten the already serious nature of the incident. Based on the opinion of these witnesses the applicant should have taken additional action to detain the named staff member and should not have allowed the staff member to re-gain access to his work unit or have any potential further contact with the residents. The subsequent investigation finding that 30 residents were injured by "thermal burns" further serves to explain why the department performed an internal affairs investigation and the multiple personnel actions against the employees involved in the "Taser incident". These multiple personnel actions included the "self- demotion" of the Chief of the Office of Protective Services and the re-assignment of the Clinical Director. In light of the totality of the circumstances it is found that the personnel action taken against the applicant may have been "harsh" but it was not so clearly out of proportion to the applicant's deficiencies that no reasonable manager could have imposed the discipline in good faith.

Based upon the above finding, the applicant's trial testimony, and review of the reports of Dr. Anderson and Dr. Lopez, it is found that on October 18, 2012 as a result of the lawful, nondiscriminatory, good faith personnel action, the applicant sustained injury to his psyche and as a compensable consequence injury to his

cardiovascular system. The applicant's claims for workers' compensation benefits as a result of the injuries to his psyche and cardiovascular system are therefore barred by Labor Code section 3208.3 (h) (See, County of San Bernardino v. WCAB (McCoy)(2012) 77 Cal. Comp. Cas. 219).

If not otherwise barred by the above statute, based upon the reports of Dr. Lopez and Dr. Anderson, it would be found that the applicant's injuries have caused permanent disability as follows:

90% (14.01.00.00 - 8 - [8] 11 - 490(J) - 18 - 23) 21
80% (03.06.00.00 - 6 - [5] 8 - 490(I) - 12 - 15) 12
40% (04.01.00.00 - 5 - [5] 6 - 490 (I) - 9 - 12) 5
21C 12 C 5 = 34%

If not otherwise barred by the above statute, based upon the reports of Dr. Anderson, it would be found that there is need for further medical treatment to cure or relieve from the effects of the injury to the applicant's cardiovascular system.

Based upon the report of Dr. Lopez, it is found that the applicant does not need further medical treatment to cure or relieve from the effects of the injury to his psyche.

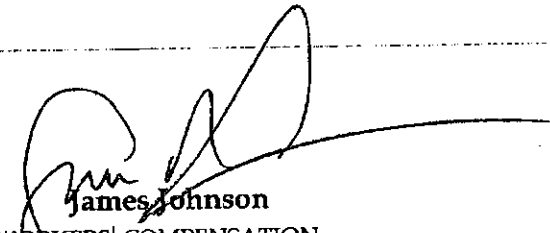
Based upon the above findings all other issues are moot."

III

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

7/28/15
Date


James Johnson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

(See attached Proof of Service)

JRJ/jl