

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/ALL OFFICES/CLIENTS

FROM: Joe Truce

DATE: May 21, 2002

RE: **BOARD'S REVERSAL OF WORKERS' COMPENSATION
JUDGE AND FINDING THAT APPLICANT'S PSYCHIATRIC
INJURY WAS DUE TO A GOOD-FAITH NON-
DISCRIMINATORY PERSONNEL ACTION**

After receiving and adverse decision from the workers' compensation judge at Trial, Greg Marsey of our Rancho Cucamonga office petitioned for reconsideration and obtained a favorable decision from the Board finding that the applicant's psychiatric injury was due to a good-faith non-discriminatory personnel action and therefore compensation benefits were not payable pursuant to Labor Code §3208.3(h).

The psychiatric claim of the applicant, Daisy Page, was hotly contested by the employer at Trial and multiple employer-witnesses contradicted the applicant's testimony and the Board relied on the employer-witnesses in reversing the workers' compensation judge.

I am enclosing the full text of the Board's decision in **Daisy Page v. Coca-Cola**, SBR 288335; SBR 288890.

WJT:wf

Enclosure- decision re **Daisy Page v. Coca-Cola**

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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. SBR 288335
SBR 288890

DAISY PAGE

Applicant,

Vs.

COCA COLA USA, INC., and TRAVELERS
INSURANCE COMPANY,

Defendant(s).

OPINION AND ORDER
GRANTING RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION

Defendant seeks reconsideration of the January 8, 2002 Findings and Award issued by the workers' compensation administrative law judge (WCJ). The WCJ found, among other things, that applicant, while employed as a shipping and data entry clerk on or about February 6, 1998 and during the period from February 9, 1996 through February 9, 1998, sustained injury arising out of an in the course of employment to her psyche, causing temporary disability from February 9, 1998 through July 1, 1998, permanent disability of 8% and the need for further medical treatment. The WCJ also found that applicant did not sustain injury to her internal system. The WCJ's opinion was based upon her determination that applicant's termination following the events of January 27, 1998 was not a good faith personnel action, thus applicant's psychiatric injury as a result of her reaction to that event and her termination is not barred by Labor Code §3208.3(h).

Defendant contends: (1) applicant has not met her burden of proof to prove her psychiatric injury; (2) applicant's claim of psychiatric injury is barred pursuant to Labor Code §3208.3(h); and (3) applicant is not a credible witness as to the events of January 27, 1998. In her Report and Recommendation on Reconsideration (Report), the WCJ

1 recommended that reconsideration be denied. Based upon our review of the entire
2 record, we shall grant reconsideration, reverse the WCJ's finding of industrial injury, and
3 substitute a new determination that applicant has not sustained an injury arising out of
4 and in the course of employment to her psyche or her internal system.

5 On January 27, 1998, an altercation occurred at applicant's place of employment
6 between applicant's brother and applicant's co-employee, Ms. Rosas. There is conflicting
7 testimony regarding applicant's participation in the altercation. Applicant testified that
8 she attempted to play peacemaker between her brother and Ms. Rosas. Two witnesses at
9 trial, Ms. Ficket and Ms. Barnes, testified that applicant attempted to physically attack
10 Ms. Rosas after the altercation, and that applicant had to be physically restrained from
11 doing so. Furthermore, witness Rick Ruth testified that his investigation of the matter
12 revealed that approximately seven witnesses to the event related to him that applicant
13 was trying to attack or swing at Ms. Rosas. After the altercation, another Coca Cola
14 employee, Mr. Sesay, was involved in a verbal altercation with applicant's brother, but
15 witnesses indicated that no physical contact occurred, and there is no evidence that Mr.
16 Sesay attempted to strike applicant's brother.

17 As a result of the incident on January 27, 1998, both applicant and Ms. Rosas were
18 terminated. Ms. Rosas appealed her termination, and was later reinstated. Applicant, on
19 the other hand, never appealed her termination. Mr. Sesay was not terminated.

20 Applicant was evaluated by Dr. Curtis, who opined that applicant sustained an
21 industrial injury to her psyche as a result of her employment. Dr. Curtis, however, did
22 not make any mention of applicant's extensive history of psychiatric injuries and
23 treatment. Dr. Feldman evaluated applicant as defendant's Qualified Medical Examiner,
24 and found that applicant's psychiatric disability was not predominantly caused by actual
25 events of her employment other than the events surrounding her termination. With
26 respect to the events surrounding her termination, Dr. Feldman considered this to be the
result of a good faith personnel action. Therefore, Dr. Feldman found that applicant has

1 not sustained a compensable psychiatric injury.

2 Labor Code §3208.3(b)(1) states:

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4 In order to establish that a psychiatric injury is compensable,
5 an employee shall demonstrate by a preponderance of the
6 evidence that actual events of employment were predominant
7 as to all causes combined of the psychiatric injury.

8 Labor Code §3208.3(h) states:

9 No compensation under this division shall be paid by an
10 employer for a psychiatric injury if the injury was
11 substantially caused by a lawful, nondiscriminatory, good
12 faith personnel action. The burden of proof shall rest with the
13 party asserting the issue.

14 The requirements of Labor Code §3208.3(h) were explained in *Rolda v. Pitney Bowes* (2001)
15 66 Cal.Comp.Cases 241 (Appeals Board En Banc). See also *Stockman v. State of*
16 *California/Department of Corrections* (1998) 63 Cal. Comp. Cases 1042 (Significant Appeals
17 Board Panel Decision) and *Larch (Fleming) v. Contra Costa County* (1998) 63 Cal. Comp.
18 Cases 831 (Significant Appeals Board Panel Decision). Broken down into individual
19 elements, we set forth in *Rolda* that in order to determine whether an alleged psychiatric
20 injury is barred pursuant to Labor Code §3208.3(h), the trial judge is to consider whether:
21 (1) the injury involved actual events of employment; (2) the claimed injury is supported
22 by competent medical evidence establishing the required percentage of industrial
23 causation; (3) the actual events were personnel actions; (3) the personnel actions were
24 lawful, nondiscriminatory, and done in good faith; and (5) the personnel actions were
25 substantial cause (at least 35%-40%) of applicant's industrial injury.

26 In this matter, the WCJ found that applicant's termination was a personnel action,
27 but that the personnel action was not nondiscriminatory because applicant was treated
28 differently than another similarly situated employee, Mr. Sesay, who was not terminated.

1 We disagree. There are differences in the circumstances surrounding the actions of
2 applicant when compared to those of Mr. Sesay on January 27, 1998. Most importantly,
3 applicant was observed by numerous witnesses to have attempted to swing at or attack a
4 co-employee. Mr. Sesay, on the other hand, was observed to only have been restrained
5 from engaging in any altercation with applicant's brother on that date. Additionally,
6 several witnesses testified that Mr. Sesay was provoked and challenged by applicant's
7 brother, after Mr. Sesay had witnessed applicant's brother batter Ms. Rosas. In contrast,
8 applicant attempted to swing at or attack Ms. Rosas after her brother had already
9 attacked her. Therefore, there is justification for the employer to have at least considered
10 different treatment of applicant as compared to its disciplinary treatment of Mr. Sesay
11 following the events of January 27, 1998.

12 Moreover, when compared to the employer's treatment of Ms. Rosas for her
13 actions on January 27, 1998, the evidence indicates that the employer did not treat
14 applicant in a discriminatory manner by terminating her. The actions of Ms. Rosas and
15 applicant were very similar, in that the evidence indicates that there was at least a verbal
16 confrontation between applicant and Ms. Rosas, and more likely they attempted to
17 physically harm the other, but were restrained from doing so. Following an investigation
18 into the events of January 27, 1998, both Ms. Rosas and applicant were terminated from
19 their employment at Coca-Cola. Therefore, applicant was treated in the same manner as
20 an employee whose actions closely paralleled those of applicant. Accordingly, we find
21 that the employer's termination of applicant was not a discriminatory personnel action.

22 The WCJ determined that the report of applicant's QME, Dr. Curtis was not
23 substantial evidence because he did not have an accurate history of applicant's extensive
24 history of psychiatric injuries and medical treatment, and we agree with the WCJ's
25 opinion in this regard. In determining whether a report constitutes substantial evidence,
26 the Board may not rely on medical reports that are erroneous, no longer germane, or
based upon inadequate medical history. (*Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.

1 3d 372, [35 Cal.Comp.Cases 525, 529]). Dr. Curtis' opinion is based on an inadequate
2 medical history, and therefore, cannot constitute substantial evidence. The WCJ also
3 opined in her Report, however, that it was defendant's burden to cure this defect in
4 applicant's medical evidence by sending the prior medical reports to applicant's QME.
5 There is no support for such a burden on defendant where defendant is represented by
6 counsel, as is the case here.

7 The opinion of Dr. Feldman takes applicant's psychiatric history into account, and
8 found that applicant has not sustained a compensable psychiatric injury pursuant to
9 Labor Code §§3208.3 (b)(1) and 3208.3(h) on either a cumulative or a specific basis.
10 Accordingly, we shall grant reconsideration and reverse the WCJ's Findings and Award
11 and substitute a new Findings and Order to find that applicant did not sustain an injury
12 to her psyche arising out of and in the course of her employment.

13 For the foregoing reasons,

14 IT IS ORDERED that defendant's petition for reconsideration of the January 8,
15 2002 Findings and Award be, and the same hereby is, GRANTED.

16 IT IS FURTHER ORDERED as the decision after reconsideration of the Workers'
17 Compensation Appeals Board, that the WCJ's January 8, 2002 Findings and Award be,
18 and the same hereby is, DELETED IN ITS ENTIRETY, and the following is
19 SUBSTITUTED THEREFORE:

20 FINDINGS OF FACT

- 21 1. Applicant, DIASY PAGE, born May 10, 1951, while employed as a shipping
22 clerk on or about February 6, 1998 and during the period from February 9, 1996
23 through February 9, 1998 by Coca-Cola USA, did not sustain injury arising out
24 of and in the course of employment to her psyche or her internal system.
- 25 2. Applicant reasonably incurred expenses for medical-legal treatment, and
26 defendant is directed to resolved the medical-legal liens of Dr. Gromis, Dr.

1 Curtis and Associated Reproduction Services, if not previously resolved, with
2 jurisdiction reserved.

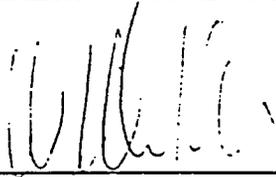
3 3. All other issues are moot.

4 ORDERS

5 IT IS ORDERED that applicant TAKE NOTHING by way of her applications
6 herein.

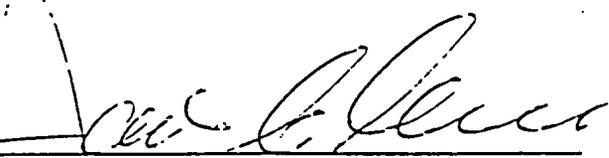
7 IT IS FURTHER ORDERED that the lien of EDD be DENIED in its entirety.
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10 WORKERS' COMPENSATION APPEALS BOARD

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14 WILLIAM K. O'BRIEN

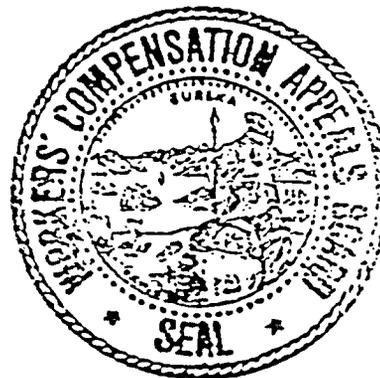
15 I CONCUR,

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18 JAMES C. CUNEO

19 CONCURRING, BUT NOT SIGNING

20 JANICE JAMISON MURRAY
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22 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

23 APR 02 2002

24 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN
25 ON THE OFFICIAL ADDRESS RECORD EXCEPT LIEN CLAIMANTS OTHER THAN
26 EDD.

