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For the foregoing reasons,

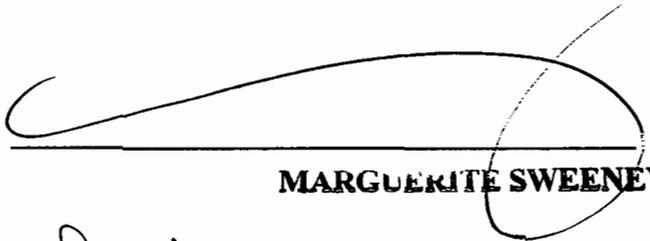
IT IS ORDERED that said Petition for Reconsideration be, and it hereby is, **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD



RONNIE G. CAPLANE

I CONCUR,



MARGUERITE SWEENEY



DEIDRA E. LOWE



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCT 29 2012

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

**MEREDITH OLIVER
STOCKWELL, HARRIS, WOOLVERTON & MUEHL
LAW OFFICE OF DENNIS HERSHEWE
EDD-VAN NUYS**



ebc

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

**WCAB Case No(s). ADJ 6933355 (MF)
ADJ 6933375**

**MEREDITH OLIVER, VS. ASTRAZENECA PLC;
OLD REPUBLIC INSURANCE
COMPANY, administered by
Gallagher Bassett Services, Inc.,
APPLICANT, DEFENDANT(S).**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE
DAVID L. POLLAK AUGUST 30, 2012

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

INTRODUCTION:

On August 29, 2012, the Applicant filed a timely and verified Petition for Reconsideration dated August 29, 2012, alleging that the undersigned WCJ erred in his Joint Findings of Fact & Orders dated August 9, 2012. The Applicant contends as follows:

1. That the Applicant was denied a fair trial based on questions asked of one of the witnesses by the undersigned WCJ; and
2. 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 her psychological system, heart, cardiovascular system (in the form of hypertension), thyroid, vocal cords, throat, neurological system (in the form of headaches), and gastrointestinal system (in the form of gastroesophageal reflux disease).

STATEMENT OF FACTS:

The Applicant, while employed as a regional sales manager for AstraZeneca plc, claimed to have sustained industrial injury on January 23, 2009 and during the period March 9, 2007 to March 9, 2009 to her heart, cardiovascular system (in the form of hypertension), thyroid, vocal cords, throat, neurological system (in the form of headaches), gastrointestinal system (in the form of gastroesophageal reflux disease) and psychological system.

The Applicant relied on the medical reporting of Warren Procci, M.D., Ph.D., to establish industrial injury to her psychological system. In addition, she relied on the medical reporting of Douglas Roberts, Jr., M.D., to establish industrial injury to her heart and cardiovascular system (in the form of hypertension), the medical reporting of Adam I. Friedman, M.D., to establish industrial causation to her vocal cords and throat, and the medical reporting of Stewart A. Lonky, M.D., to establish industrial causation to her gastrointestinal system (in the form of gastroesophageal reflux

disease). While neither Dr. Roberts, Jr. nor Dr. Friedman discussed industrial causation, Dr. Lonky, in his report dated February 10, 2010, on page 12, determined that the Applicant had gastrointestinal symptomatology that was a compensable consequence of her psychological claims of injury with AstraZeneca plc.

The Defendant relied on the Panel Qualified Medical Examination report of Barbara J. Justice, M.D., dated December 3, 2010, to rebut the Applicant's contention that her psychological injury was industrial.

The trial was contentious, lasting seven full days, and included the testimony from the Applicant and co-workers Dawn Miller, Marina Sustaita, Anthony Rosson, Carol Hemker, Alfonso Serrano and Stephanie Sobel.

On October 18, 2011, during the direct examination of Ms. Miller, the following testimony was elicited:

"She was supervised by the Applicant and complained that, unlike her other bosses who were motivating and constructive, the Applicant would motivate through fear, was disrespectful in her tone and was harshly punitive, threatening unfairly to put Ms. Miller on performance reviews. Ms. Miller described one incident when the Applicant was abusive in her tone in criticizing her for not behaving commensurate with her paid grade. She would describe the Applicant as Gordon Ramsey-like in her tone without the profanity."¹

The undersigned WCJ issued his Joint Findings of Fact & Orders and Joint Opinion on Decision dated August 9, 2012, that found, based primarily on the credible testimony of Ms. Sobel and in accordance with Labor Code § 3208.3(b)(1), Rolda v. Pitney Bowes, Inc. (2001) 66 Cal. Comp. Cases 241, 247 (en banc) and County of San Bernardino v. Workers' Comp. Appeals Bd. (McCoy) (2012) 77 Cal. Comp. Cases 219, 221, that the Applicant did not sustain industrial injury to her heart, cardiovascular system (in the form of hypertension), thyroid, vocal cords, throat, neurological system (in the form of headaches), gastrointestinal system (in the form of gastroesophageal reflux disease) and psychological system.

DISCUSSION:

QUESTIONING OF DAWN MILLER

The Applicant contends that questions asked by the undersigned WCJ, on day two of the seven day trial, of the Defendant's witness Dawn Miller deprived the Applicant of a fair trial. However, rather than raising this contention shortly after the October 18, 2011, trial by way of a petition to disqualify, she chose instead to raise it for the first time in her petition for reconsideration when she received a decision that she didn't like.

¹ Minutes of Hearing (Further) and Summary of Evidence dated October 18, 2011, page three, lines 20 to 25

Ultimately, it is the duty of a WCJ conducting a trial to impartially and objectively “make and file findings upon all facts involved in the controversy.” [Labor Code § 5313; see Hernandez v. AMS Staff Leasing (2011) 76 Cal. Comp. Cases 343, 348 (significant panel decision)] This includes the need to conduct questioning of witnesses to clarify facts. In this case, Ms. Miller had difficulty in articulating her characterization of the Applicant. When asked to compare it to the personality of a celebrity, her description of the Applicant was clarified.

Therefore, there is no basis to assert reversible error.

GRAVITY OF THE EVIDENCE

The Applicant next 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 injury.

A WCJ 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]

As set forth by the undersigned WCJ in his Joint Opinion on Decision dated August 9, 2012, on pages one and two:

“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 psychiatric injury involves actual events of employment, a factual/legal determination;

- (2) if so, whether such actual events were the predominant cause of the psychiatric 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 percent) of the psychiatric 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] 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 injured worker'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)]

In this case, based on the panel Qualified Medical Evaluation report of Barbara J. Justice, M.D., [dated December 3, 2010] on pages 110 to 111, deemed better reasoned and more persuasive than the treating physician's reports of Warren R. Procci, M.D., Ph.D., 50% of the causation of the Applicant's mental condition was due to the effects of working for Stephanie Sobel as her supervisor whom she described as having an inappropriate, perfectionistic, demanding, and critical management style. In addition, 20% of the causation of the Applicant's mental condition was due to the effects of being overworked during the time she worked under Ms. Sobel. Finally, 30% of the causation of the Applicant's mental conditions was due to the effects of three discrete personnel actions. Of that 30%, 10% was caused by the effects of the August 2008 mid-year performance evaluation, 10% was caused by the effects of the December 2008 performance evaluation, and 10% was caused by the effects of being terminated.

With respect to the Applicant's allegation of stress from working with Ms. Sobel, the undersigned WCJ determined that the Applicant's testimony regarding her characterization of Ms. Sobel was not credible. Instead, based on the credible testimony of Ms. Sobel, she took appropriate remedial steps to counsel the

Applicant given her history of abusive behavior directed at her co-workers. This abusive behavior was corroborated by the credible testimony of Dawn Miller, Marina Sustaita, Anthony Rosson, Carol Hemker and Alfonso Serrano. These corrective actions in response to the Applicant's behavior were misperceived by her as harassment. Therefore, in accordance with Verga, given that the Applicant's perceptions about Ms. Sobel were deemed not true, the alleged stress from it was found not to be an actual event of employment.

With respect to the Applicant's allegations of stress from being overworked during the time she worked under Ms. Sobel, based on the Applicant's testimony, this is an actual event of employment and not a personnel action.

Finally, with respect to the Applicant's two performance reviews and her termination, there is no dispute that they were actual events of employment. However, for the reasons that were previously set forth above, they were legitimate, good faith, personnel actions given that they were reasonable attempts to address the Applicant's abusive behavior toward her co-workers. When those remedial measures failed to correct the Applicant's behavior, she was appropriately terminated for cause. The Applicant's testimony to the contrary was deemed not credible.

For the reasons that were set forth above and in accordance with Labor Code § 3208.3(b)(1) and Rolda, the Applicant's claim of psychological injury cannot be deemed industrial because, while only 30% (i.e., not a substantial cause) of the Applicant's psychological injury was due to legitimate, good faith, personnel actions, only 50% of the Applicant's psychological stress was due to actual events of employment. Therefore, the Applicant's claim of psychological injury was not predominantly caused by actual events of employment and, therefore, cannot be deemed compensable.

In addition, given that the Applicant was found not to have sustained a compensable injury to her psychological system, the Applicant was also found not to have sustained any resulting physiological injury to her heart, cardiovascular system (in the form of hypertension), thyroid, vocal cords, throat, neurological system (in the form of headaches), and gastrointestinal system (in the form of gastroesophageal reflux disease)."

Notwithstanding the Applicant's critical characterizations of the Defendant's witnesses and her false contention that the undersigned WCJ failed to review the documentary evidence, the undersigned WCJ still found the Defendant's witnesses credible, convincingly painting the Applicant as a bully who abused her authority by using intimidation tactics as a supervisory tool. In addition, given her and her attorney's poor behavior and demeanor, the undersigned WCJ properly concluded

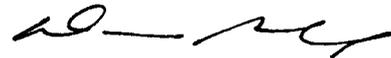
that, after being terminated, she was using the litigation process as a retributory tool to harass her employer and further harass her co-workers. Finally, after carefully reviewing the performance reviews, they were deemed proper remedial measures intended to correct the Applicant's inappropriate behavior.

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

RECOMMENDATION:

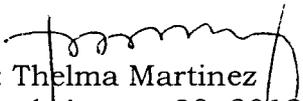
The undersigned WCJ respectfully recommends that the Applicant's Petition for Reconsideration dated August 29, 2011, be denied.

Date: August 30, 2012



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: August 30, 2012