



LAW OFFICES  
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## LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

January 2010

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# REVISITING ROLDA:

## WINNING A "GOOD- FAITH PERSONNEL ACTION"

Often is the time when a defendant has denied a psychiatric claim, and among the grounds for denial is the lawful, nondiscriminatory, good-faith personnel action defense under Labor Code Section 3208.3(h). Unfortunately, often also is the time when this defense is merely asserted in an Answer and/or Notice of Denial of Claim, but the defense is not specifically brought to the attention of the psychiatric AME or Panel QME. The necessary evidence must be made available for the doctor to make findings required pursuant to *Rolda vs. Pitney Bowes* (2001) 66 Cal. Comp. Cas 241 ("Rolda"). Failure to provide the evidence can be fatal to the doctor's opinion, and the defense on a medical basis will ultimately fail.

The Rolda case laid out a four-step analysis that the Workers' Compensation Judge must follow to determine whether the claimed psychiatric injury is compensable or to be barred by Labor Code Section 3208.3(d) as having been caused by a lawful, non-discriminatory, good-faith personnel action. However, the code does not

specify the steps a defendant should take to ensure that this defense is effectively put forward.

It is the applicant's initial burden to prove an industrial psychiatric injury. He or she must demonstrate, by a "preponderance of the evidence" (i.e., greater than 50%) that "actual events of employment" were "predominant as to all causes combined" of the psychiatric injury. [L.C. 3208.3(b)(1).] If the applicant were to testify that he or she was harassed by the employer and suffered psychiatric symptoms as a result, and if a medical report were to find that such harassment "predominantly caused" (undefined in the Labor Code but found in case law to mean greater than 50%) the psychiatric injury, the applicant would have then met his or her burden of proof and enjoy a compensable psychiatric injury, notwithstanding that a good-faith personnel action had been asserted as a defense in an Answer or Notice of Denial of psyche injury claim.

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The key to prevailing on a good-faith personnel action defense is in knowing when the burden shifts to the defendant to prove its claimed defense, and taking the necessary steps to meet that burden at the right time and before it becomes too late to do so. However, as explained in more detail below, if the defendant sends all of the evidence needed to support the good-faith personnel action defense to the doctor before the medical examination, the defendant will have done what's necessary in one fell swoop.

The Court in Rolda laid out the four-step "good faith personnel action defense" analysis that a WCJ must perform: (1) A determination must be made that actual events of employment are involved. This is a factual/legal determination for the WCJ to determine, not a medical one. (2) There must be competent medical evidence establishing that the actual events of employment were the predominant cause -- i.e., greater than 50% -- of the injury to the psyche. (3) If so, a further determination must be made establishing whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith—a factual/legal determination for the WCJ. (4) Finally, a determination must be made as to whether the lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" -- i.e., 35 to 40% -- of the psychiatric injury. This requires competent medical evidence.

While determination of steps 1 and 3 of the Rolda analyses are ultimately left up to the WCJ, with steps 2 and 4 being left to the doctor to determine, the WCAB has not required the parties to bounce back and forth between the doctor and the WCAB in multiple medical examinations and Appeals Board hearings to make the respective determinations needed in the order as described/laid out in the Rolda case.

Instead, the parties may first proceed to the doctor for his or her determinations, and then the parties may proceed to the WCJ for his or her respective factual/legal determinations.

This would suggest, then, that while two of the steps/determinations are ultimately left up to the WCJ, the doctor must also be made aware of the facts that are factual or legal in nature, and must make either a pseudo-finding regarding their truthfulness, or must make a medical determination based on an assumption that they are true. That is, the doctor must be made aware of the facts concerning the actual events of employment, and then must make an assumption that actual events occurred in order to determine whether those employment events predominantly caused (greater than 50%) a psychiatric injury, and if so, whether a substantial part (i.e., 35 to 40%) of the "actual events" of employment are related to a good-faith personnel action.

As competent medical evidence is required in two of the four steps needed for such an analysis, much of the outcome will depend on the doctor's findings. But how can we have any control over the doctor's findings? By making sure the doctor has sufficient evidence to make his or her Rolda determinations ahead of time, i.e., *before* the doctor examines the applicant. The doctor should certainly be made of aware of the defense position regarding the good faith personnel action defense. In fact, it should be spelled out clearly in the instructional letter to the doctor, and attaching a copy of the Rolda decision would be a good idea, as well. However, merely stating the defense position in the instructional letter is probably not going to be sufficient if you want the doctor to address the issues competently.

So, what else should be sent to the doctor prior to the examination? Let's get back to basics: The

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deposition of the applicant may be very determinative towards the issue of whether or not actual events of employment are involved, and it's a good place to start in terms of gathering evidence one would need to provide to the doctor. What are the applicant's allegations? Is the applicant complaining that he or she was harassed by the employer, and that such harassment caused his or her depression and anxiety? Was the applicant fired, and is the applicant alleging that he or she was fired because the employer singled him or her out for no valid reason, and because of this, they are suffering psychiatric symptoms? Are there also orthopedic or internal medicine complaints that the applicant is alleging as a proximate result ("sequelae") of the alleged psyche injury? The deposition of the applicant can be an invaluable source of information regarding what alleged workplace events occurred, and what the applicant's symptoms are. If this information is gathered during the deposition, the transcript should be sent to the doctor prior to the examination.

What sort of information should the doctor have in order to make his or her first determination that actual events of employment were the predominant cause -- (that elusive greater than 50% ) -- of injury to the psyche? To this end, applicant's medical history is going to be very important. Of course, the deposition should explore the applicant's medical history. Additionally, the doctor should be provided with as many medical records and reports concerning the applicant as possible. If the doctor is not provided with any medical evidence that the applicant has other possible causes for injury to his psyche, his or her job will certainly be made the central point of the applicant's psychiatric injury, so in the absence of any other information, it was predominately caused by work events. Therefore, it is important to send to

the doctor the *entire* medical record, including any subpoenaed records with respect to any prior and/or non-industrial injuries of any sort, going as far back as possible, so that the doctor can make such a determination competently based upon the entire medical, employment and emotional history .

Assuming for argument's sake that the doctor now has enough information to determine that actual events of employment are involved and that applicant's psychiatric injury is predominantly caused thereby, the doctor will now need to determine if a substantial cause of the psyche injury was due to personnel action(s), which the doctor must assume was done lawfully, non-discriminatorily, and in good faith. This writer recommends sending to the doctor either a transcript of the recorded statements of the employer witnesses concerning the good faith personnel action, or if applicant attorney objects based on lack of opportunity to cross-examine the witnesses, then taking the deposition of the employer witnesses and sending the deposition transcripts to the doctor.

Often, the defense carrier will hire an investigation company to conduct an employer-level investigation, including interviews of various employer witnesses regarding the circumstances surrounding the applicant's employment and any possible connections to the applicant's alleged psychiatric injury. Sending a copy of the investigation report to the doctor would certainly be easy, but then the doctor is working off second-hand information, as the reports are generally narrated by a third party investigator who summarizes the statements made to him or her by the employer witnesses. In short, it is "hearsay" information that might not be completely accurate, or that might be edited as the investigator feels fit. However, the investigation report will often indicate whether

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the statements of the employer witnesses have been *recorded*. If so, ask the investigator to have the statements *transcribed*. The *transcriptions* of witness statements are what should be sent to the doctor prior to the medical examination. They should include all questions and all answers as will provide the context of a statement and the most accurate and unabridged information for the doctor to use in his or her analysis.

Of course, these transcriptions will need to be sent to the applicant's attorney before sending them to the doctor, and thus you will be "showing your cards" to the applicant, but such is the necessary price to ensure that the doctor has everything he or she needs to issue a competent report. If the applicant's attorney agrees to send the transcript(s) to the doctor, then this step is completed. If the applicant's attorney objects based on a lack of opportunity to cross-examine the employer witnesses, then it is recommended that the employer witnesses' depositions be taken. This affords the applicant's attorney the right of cross-examination. The deposition transcripts can then be forwarded to the doctor.

The contents of the applicant's *personnel file* may also be very telling with respect to the basis for any good-faith personnel action. Presuming the contents of the personnel file include career assessment data/reports and discipline and honorary annotations, this file should also be sent to the doctor (and to the applicant's attorney) prior to the medical examination.

In summary, be certain to get as much evidence to the doctor ahead of time as possible, including, but not limited to the applicant's deposition transcript, all medical records and reports (including subpoenaed records), the transcripts of the recorded witness statements (or their deposition transcripts) concerning actions taken against the applicant, and the contents of

applicant's personnel file. Also, be sure to inform the doctor that a good faith personnel action defense is being made in the joint letter, and to the extent the applicant attorney allows, try to spell out the specifics of the defense in the joint letter so that the doctor is made well aware of the facts and what is being claimed prior to examining the applicant. This is the best way to ensure that the doctor has everything he or she needs to complete an informed analysis as required under Rolda. This will reduce the likelihood of receiving an incomplete report from the doctor and having to later send this information to the doctor and/or take the doctor's deposition. Following the Rolda requirements and distributing the evidence discussed above should increase the chances that the WCJ will be able to make an informed analysis to support making the ultimate factual/legal determination as to whether the defendant has met its burden of proving up the good faith personnel action defense.

Article by [Stephen T. Gargaro](#), Los Angeles office

### **Deposition Fees**

Hourly rates for fees ordered to be paid to applicant attorneys will vary by WCAB location. A recent informal survey by our attorneys in Southern California found that, for experienced counsel, the hourly rate is often granted at \$300 per hour and, in some instances, we have seen orders up to \$350 per hour. Bear in mind the rate in any instance should also be dependant upon the degree of experience of counsel and whether or not the attorney is a Certified Specialist.

### **Beware the Medicare Grinch**

The assumed potential threat of Federal Government lawsuits against carriers for failing to consider Medicare's interests when settling cases is apparently becoming a reality. In the

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recently reported case of USA v. Stricker, Medicare has filed a lawsuit seeking to recover benefits paid to 907 recipients of a class action settlement. Foregoing the presumed shallow pockets of the plaintiffs who received the settlement money, the government is going after those who paid the settlement including some large insurance carriers and employers.

### **Spine Surgery Disputes**

The Administrative Director recently issued a memo for claims personnel clarifying procedures to be used when dealing with requests for spine surgery. The memo is intended to comply with case law laid down in *Cervantes v El Aguila Food Products*. The memo can be found at [http://www.dir.ca.gov/dwc/dwc\\_newslines/2010/Newsline\\_02-10.html](http://www.dir.ca.gov/dwc/dwc_newslines/2010/Newsline_02-10.html). The *Cervantes* decision provides very limited time for completion of the Utilization Review process and mandates that, if UR declines to certify the surgery, the adjuster must file an objection on the specified form within time limits. For a discussion of the decision, see the December 2009 edition of Legal Briefs at [www.mcdermott-clawson.com](http://www.mcdermott-clawson.com) in the "Recent Events" column.

### **Need Assistance with Training?**

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email [Howard Stevens](mailto:Howard.Stevens@mcdermott-clawson.com) at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

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