



CALIFORNIA JOB STRESS - SPECIAL DEFENSES TO WORKERS' COMPENSATION CLAIMS

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In California employees who suffer from stress at work are allowed to file a workers' compensation claim. There are, however, some important statutory limitations on recovery in stress claims as follows:

I. POST TERMINATION STRESS

Generally speaking, an employee may not sue his employer for stress AFTER he has been terminated. There are several exceptions in the law, as set forth below:

Labor Code Sec. 3208 (e)

Where the claim for compensation is filed after notice of termination of employment or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury and one or more of the following conditions exist:

- (1) Sudden and extraordinary events of employment were the cause of the injury.
- (2) The employer has notice of the psychiatric injury under Chapter 2 (commencing with Section 5400) prior to the notice of termination or layoff.
- (3) The employee's medical records existing prior to notice of termination or layoff contain evidence of treatment of the psychiatric injury,
- (4) Upon a finding of sexual or racial harassment by any trier of fact, whether contractual, administrative, regulatory, or judicial.
- (5) Evidence that the date of injury, as specified in Section 5411 or 5412, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

It is important to establish a record of treatment and/or to report a stress injury at work before termination occurs. In addition, it may be asserted that -

(1) a *voluntary quit* is not included in the rule and/or

(2) that the termination itself was handled in an extremely unreasonable manner, making the trauma associated with it a specific injury occurring on the date the termination took place.

Procedure for Making Claim

The claim is filed when an injured worker fills out a form called "Employee's First Report of Injury" and submits it to the employer. There is a box at the top for the worker's name, address, a statement of the date and time of injury and listing of the body parts hurt. The employer is required to provide this form whenever it becomes aware of a work injury, or if an employee makes a report. Thus it is incumbent on the employee to take the initiative when the injury is not obvious or likely to be recognized by the employer in a proactive manner.

Once the form is turned in, the employer fills out the bottom box identifying its carrier, the date and manner in which the report was received. The employee should be provided with a copy, and another copy is turned in to the employer's carrier for opening a claim file.

II. GOOD FAITH PERSONNEL ACTION

There is no compensable claim against the employer for ordinary personnel actions such as changing the employee's hours, even when we all know the employer is singling the employee out for mistreatment. There is a truly vast array of stressful things that regularly occur at work but the employer usually argues that it was all done in the course of his good faith conduct of the business, rather than with the intent to injure the worker. Look for indicators such as yelling at the employee in front of others, or other acts of deliberate over reaching that would cause a reasonable worker to suffer the stress of extreme fear, embarrassment, anger, humiliation or chagrin.

The statute reads:

Labor Code Sec. 3208.3 (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.

SYLLABUS

Hanna, R. v UCLA - Petition for Writ of Review, California Court of Appeals - 1999

Michael Worthington, Attorney for Petitioner Regaie Hanna

Petitioner Regaie Hanna requested issuance of a writ of review for the purpose of inquiring into and determining the lawfulness of the Opinion and Decision After Reconsideration filed on August 27, 1998 by respondent Workers' Compensation Appeals Board

Employer Regents of The University of California

Claims Administrator - Applied Risk Management

Injuries - During the period 4/15/74 to 12/7/95 Regaie Hanna was employed as a Janitor at the University of California at Los Angeles by the Regents of the University of California. During that time, Petitioner claims to have sustained injuries to his psyche and on an internal medicine basis due to fluid around the heart and lungs.

Findings - On or about December 11, 1995 Petitioner filed an application for adjudication of claim with the Appeals Board. Thereafter, on February 25, April 30, and June 30, 1997 the matter was tried by Honorable Mark Feldman at Van Nuys. Findings and Award issued September 3, 1997 favorable to Applicant, including permanent disability and entitlement to future medical care

Judge Feldman's decision was overturned by the WCAB on the basis that the defense should not have been required to show that its personnel actions were adequately explained to the employee as part of the burden of proof under LC 3208.3(h).

The WCAB adopted the purely semantic distinction of the defense, that the manner in which the transaction is conducted is somehow completely separate from the personnel action itself. Petitioner argued that these two elements are inextricably bound together, and the WCAB's Opinion was seriously flawed in this regard. Petitioner's contentions included the following:

The good faith rule is not standardless, which would permit a personnel action to be based on subjective reasons which are pretext and mask arbitrary and unlawful motives which are unreviewable [Cotran v Rollins Hudig Hall International (1998) 17 C 4th 93 [69 Cal Rptr 2d 900]

Harassment based on the basis of national origin is shown when it has the effect of unreasonably interfering with the employee's work performance and creating an intimidating, hostile, or offensive work environment that seriously affects the psychological well-being of the employee. [Boutros v Canton Regional Transit authority, CA 6 (Ohio) 1993, 99 F 2d 198]

The question whether a legitimate business reason offered in defense of an employment action that qualifies as prima-facie discriminatory is pretext may be decided by reference to the surrounding circumstances and apparent motives of the employer. [Catlett v Missouri Highway and Transp. Comm'n, DC Mo 1983, 589 F Supp 929]

Notwithstanding a factual picture that was replete with bad faith animus on the part of the employer, the Court of Appeals did uphold the decision of the WCAB in this matter without comment. It is of the utmost importance to ferret out the bad faith conduct from the very beginning, to advise the Applicant of the Good Faith Personnel Action Rule and to ensure that if a deposition is taken, and/or at the time of trial, any bad faith conduct on the part of the employer is clearly delineated.

III. THE 51% RULE

The employment stressors must account for at least 51% of the injured workers aggregate psychiatric disability. This defense, while harder to show, can be efficacious when the worker has had a stressful life outside the job. The rule is as follows:

Labor Code Sec. 3208.3 (b) (1)

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

Needless to say, everyone suffers some level of stress in their life. Common sources of stress are difficult finances, relationships, divorce, family or personal illness, death of loved ones as well as any other personal tragedy. It is also not unusual for there to be a psychiatric history, possibly including hospitalization, that preceded the stress in the work place.

All the pertinent medical records will be accessible to the defense by subpoena. The Applicant is called in to testify at a deposition in the majority of cases, and it can be anticipated that many questions will be asked that are calculated to develop a factual argument that factors other than work are the predominant causes of Applicant's psychiatric injury.

One compelling argument for the Applicant might be that he/she was able to work without restrictions for some period of time before the psychiatric injury became labor disabling. There are often a number of other things to think about in preparing for workers' compensation medical examinations, to discuss in therapy with the treating doctor and in preparation for deposition. The important thing is to be aware of the rules and to think ahead of time about the relative impact of various stressors.

IV. THE SIX MONTH RULE

A worker must have at least six (6) months on the job before he can file a claim for stress against his employer.

Labor Code Sec. 3208.3 (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. ..

This rule targets employees who haven't been on the job very long, preventing them from alleging that their new jobs were so stressful that they suffered psychiatric injury. It can also be invoked in situations where the employment was brief, even if marginally in excess of six months.

This section reiterates that the WCAB has exclusive jurisdiction over injuries at work in the absence of a statutory exemption, meaning these claims can't be raised in court. We do, however, regularly bring court action for wrongful termination of employment, even including violation of Labor Code section 132a which prohibits retaliatory discharge of a claimant because he pursued workers' compensation benefits.

There are "specific" and "cumulative trauma" injuries in workers' compensation described as follows:

Labor Code Sec. 3208.1

An injury may be either:

- (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or
- (b) "cumulative," occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of a cumulative injury shall be the date determined under Section 5412.

According to the 6 month rule, there is a claim for specific injury irrespective of length of employment so long as the single incident is severe enough to cause disability or the need for medical treatment in and of itself. We use the example of a newly hired bank teller who is taken hostage in a robbery. There are many cases in which the employee has severe symptoms while at work and medical treatment has to be provided, such as being taken in an ambulance to the emergency room.

Cumulative injuries are, for purposes of stress claims, the result of a series of insults or abuses over time which culminate in an inability to continue working. In the struggle to hang on to his job, an employee may still have to call in sick from time-to-time or go off work on disability. This is when we receive a major portion of our inquiries regarding job stress, after the employee can no longer tolerate the situation.

The statutory definition for date of injury in cumulative cases is:

Labor Code Sec 5412.

The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

It is easy to get caught in a bind between suffering with inordinate stress at work and putting off a claim for workers' compensation benefits. The catches are that:

- (a) the longer it is tolerated without complaint the more it appears to be sour grapes, especially when serious adverse job action including termination is imminent, and
- (b) although they are very lenient in workers' compensation, time requirements for filing claims do exist. For the Employee Claim for Benefits it is 30 days from the date of injury.

CONCLUSION

California has been very progressive in its workers' compensation legislation over the years, and the availability of benefits for stress injuries is an example of this. We find that there is an enormous number of claims where the presenting complaint is stress on the job and in a preponderance of initial interviews it takes quite a bit of discussion to bring out the fact that meaningful physical injuries have also occurred. For this reason alone, it pays for Applicant attorneys to be familiar with the special rules governing stress claims and to be willing to pursue them despite the limitations.