

In the Matter of the Compensation of
TROY L. BERRY, Claimant

WCB Case No. 15-02327

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Curey, Weddell and Somers.

Claimant requests review of Administrative Law Judge (ALJ) Fisher's order that upheld the self-insured employer's denial of claimant's occupational disease claim for a mental disorder. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

Before filing his claim, claimant had worked as a high school basketball coach and campus security monitor for ten years. (Tr. 10). Shortly before the beginning of the 2013 school year, his employer decided not to renew his contract as basketball coach, and later, transferred him to another high school as a campus security monitor. (I-Tr. 12, II-Tr. 10, 12-14).

In October 2013, one month into his new position, claimant was informed that he was being investigated regarding misuse of travel funds for his former school's basketball team. (Tr. 13). A "fact-finding" meeting with human resources personnel from the school district was held. (Tr. 13, 93-95). Claimant informed the participants of the meeting that he had no access to the travel funds. (Tr. 13-14). Later, after re-contacting school officials, claimant was informed that he was no longer a subject of the investigation. (*Id.*)

On November 3, 2014, claimant sought treatment for neck and back pain after doing some warehouse work. (Ex. 14-1). At that time, he reported no problems with anxiety, depression or insomnia. (*Id.*)

Some time in October or November 2014, news media reported that students were filming each other having sex in restrooms or other areas at claimant's current school. (I-Tr. 17, II-Tr. 134). In early November 2014, he was present at a meeting attended by all school district security personnel. During that meeting, it was announced that one of the campus security monitors at claimant's school was allowing students access to offices and other places for sexual purposes. (I-Tr. 15-16, II-Tr. 148). Later, claimant attended a meeting with the school's vice

principal, security director, and security manager. (Tr. 36). The security director, Mr. Weatheroy, stated that he had received allegations that a campus security monitor was allowing students into locked bathrooms for sexual purposes. (I-Tr. 17, II-Tr. 135).¹ Claimant denied any knowledge or involvement regarding the allegation. (I-Tr. 17, II-Tr. 136).

On November 19, 2014, Dr. Hayes reported that claimant did not feel like himself, lacked energy, and did not feel much joy in life. (Ex. 19-1). Dr. Hayes recommended treatment for sleeping difficulties that claimant was also reporting, but noted that a diagnosis of depression should be considered if he did not improve. (Ex. 19-3).

On December 8, 2014, the school district received two complaints from students alleging “inappropriate touching” by claimant. (Ex. 50). On December 10, 2014, after the students were interviewed, claimant was placed on administrative leave. (I-Tr. 17; Ex. 50). In a December 18, 2014 meeting, Mr. Weatheroy questioned claimant regarding complaints from female students about physical contact and comments that made them feel uncomfortable. (Ex. 50; II-Tr. 17). Mr. Weatheroy testified that several students and numerous staff members at claimant’s current and former schools were interviewed regarding “touching that made students uncomfortable.”² (II-Tr. 137-138, 140, 141).

In January 2015, Dr. Hayes noted that claimant was under “considerable stress,” though claimant did not reveal the particular source of his stress at that time. (Ex. 25-3).

On February 12, 2015, Dr. Hayes reported that claimant was under “tremendous stress.” (Ex. 27-1). Dr. Hayes noted that claimant believed his dismissal as a basketball coach and transfer to another school was in retaliation for a conflict with one of the player’s parents. (Ex. 27-1, -2). Dr. Hayes recorded that claimant was then accused of embezzlement, but the charges were dismissed. (Ex. 27-12). Dr. Hayes also reported that claimant was accused of allowing students to use his office for sex, and then was accused of “inappropriately touching” students. (Ex. 27-12).

¹ Mr. Weatheroy testified that a vice principal was present because the meeting was to discuss work performance issues, but claimant was also incidentally asked about the allegations. (Tr. 156-157).

² Mr. Weatheroy testified that he always clarified that he was referring to the touching of female students’ shoulders or hair. (Ex. 141).

Dr. Hayes diagnosed a stress reaction “from [claimant’s] situation at work,” and noted that claimant was also depressed. (Ex. 27-4). Dr. Hayes recommended counseling and stated that claimant should not presently return to work. (*Id.*)

On February 13, 2015, the employer sent claimant a letter, informing him of the results of its investigation; *i.e.*, the employer was “not able to substantiate” the specific complaints it received from the students. (Ex. 50-4). However, noting that claimant admitted that he sometimes touched the shoulders of female students or their hair in “jest or in horseplay,” the letter admonished him from engaging in such behavior, and reprimanded him regarding other job performance issues. (Ex. 50-5). Following this reprimand, claimant was offered the opportunity to return to his campus security monitor duties. (II-Tr. 144).

On February 17, 2015, Dr. Hayes completed medical leave forms. (Ex. 28). He noted that “[b]ecause of multiple accusations leveled against [claimant] and rumors circulating about those accusations, the work environment has become unbearable for [him]. [Claimant] has such intense emotional reactions due to the stress that he develops physical symptoms contemplating returning to work. Previously, these symptoms occurred each day he was to work.” (Ex. 28-2).

On March 9, 2015, Dr. Hayes noted that claimant was rarely leaving his home, and that a friend was doing his cooking, shopping, laundry, and cleaning. (Ex. 29-1). Dr. Hayes diagnosed depression, stress, agoraphobia, and anxiety due to stress from work. (Ex. 29-2). On March 11, 2015, Dr. Hayes asked claimant to complete a “workers’ comp form.” (*Id.*)

On March 25, 2015, following a referral from Dr. Hayes, claimant was evaluated by Dr. Friedman, a psychiatrist. (Ex. 32). Following the completion of her evaluation after a second interview of claimant on April 9, 2015, Dr. Friedman diagnosed “[m]ajor depression, single episode.” (Ex. 32-8). She noted that claimant presented as a “previously very happy and well adjusted individual,” but that, once he realized “how widely spread these shaming rumors had become, his confidence dissolved to the point that he found it difficult to leave home.” (Ex. 32-8). Dr. Friedman reported that claimant then developed symptoms of major depression including insomnia, weight and appetite loss, loss of motivational energy, social withdrawal, anhedonia,³ constipation, migraine headache, and

³ “Anhedonia” is defined as the “[a]bsence of pleasure from the performance of acts that would ordinarily be pleasurable.” Stedman’s Electronic Medical Dictionary, version 7.0 (2007).

periods of passive suicidal ideation. (*Id.*) Observing that Dr. Hayes had directed claimant to file a workers' compensation claim, she considered that to be appropriate "given the nature of his situation." (*Id.*)

In October 2015, Dr. Hayes, who had served as claimant's primary care physician since 2004, commented that he had observed a significant change in claimant following the workplace allegations, which he concluded were the major contributing cause of claimant's depression. (Ex. 45-10). Dr. Hayes noted that claimant had been disciplined regarding job performance issues, however, he considered that to be an "afterthought" and not the "main reason" that claimant developed symptoms of depression. (Ex. 45-12).

On October 9, 2015, Dr. Friedman explained that her diagnoses included depression and post-traumatic stress syndrome. (Ex. 46-4). She opined that it was "the nature of the false [workplace] accusations and not the subsequent complaints about [claimant's] work ethic that provoked [claimant's] emotional breakdown." (Ex. 46-5). She further explained that claimant had numerous friends and acquaintances approach him regarding the workplace investigations and that these encounters were "distressing in that they confirmed that information about his investigation was widespread in his community." (Ex. 46-5). She concluded that claimant's mental health conditions were "entirely related to the devastating effects of the workplace allegations and investigation." (Ex. 46-8).

In her deposition, Dr. Friedman testified that a combination of circumstances resulted in claimant's mental disorder, including a feeling of being unwelcome in his new position after transferring high schools, culminating in the accusations of misconduct with students. (Ex. 53-68, -73). She concluded that the allegations against claimant were the major contributing cause of his major depression. (Ex. 53-60, -65, -67, -74).

The ALJ interpreted the opinions of Drs. Hayes and Friedman as attributing claimant's mental stress to the accusation and investigation of embezzlement, the investigation regarding sex tapes made by students, and the allegation and investigation regarding "inappropriate touching" of students. The ALJ then proceeded to consider whether each investigation/allegation on the part of the employer was "reasonable" or "unreasonable." The ALJ found the investigation into the alleged embezzlement to be "reasonable," and therefore an excluded work-related factor. *See* ORS 656.802(3)(b). Addressing the opinions of Drs. Hayes and Friedman, the ALJ noted that they did not separately analyze the contribution of excluded and non-excluded work-related factors. Under such circumstances, the ALJ upheld the employer's denial.

For a mental disorder claim to be compensable, there must be a diagnosis of a mental or emotional disorder generally recognized in the medical or psychological community, and the employment conditions producing the mental disorder must exist in a real and objective sense. ORS 656.802(3)(a), (c). The employment conditions producing the mental disorder must be conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective, or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles. ORS 656.802(3)(b). There must be clear and convincing evidence that the mental disorder arose out of and in the course of employment. ORS 656.802(3)(d). To be “clear and convincing,” the truth of the facts asserted must be highly probable. *Riley Hill Contractor Inc. v. Tandy Corp.*, 303 Or 390, 402 (1987); *David M. Sinclair*, 67 Van Natta 63, 64 (2015).

In the context of a mental disorder claim, both those factors excluded by ORS 656.802(3)(b) and non-work-related factors must be weighed against nonexcluded work-related factors. Only if the nonexcluded work-related causes outweigh all other causes combined is the claim compensable. *Liberty Northwest Ins. Corp. v. Shothafer*, 169 Or App 556, 565-66 (2000).

Whether claimant’s condition is caused in major part by the work exposures and otherwise meets the “mental disorder” criteria presents a complex medical question that must be resolved on the basis of expert medical evidence. *Uris v. Compensation Dept.*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 281, 283 (1993).

Based on the following reasoning, we conclude that Drs. Hayes and Friedman based their opinions, in part, on excludable work-related factors. Because their causation opinions do not separately weigh the excludable work-related factors, they do not persuasively establish the compensability of the claimed mental disorder. *See Rory S. Lewno*, 66 Van Natta 2075, 2076 (2014).

We turn to the allegations and investigation regarding “inappropriate touching” of students. Claimant contends that the investigation was performed in an unreasonable manner that allowed rumors to circulate in his community. Based on the following, we consider the employer’s investigation to have been reasonable.

On December 8, 2014, the school district received two complaints from students alleging “inappropriate touching” by claimant. (Ex. 50). On December 10, 2014, after the students were interviewed, claimant was placed

on administrative leave. (Tr. 17; Ex. 50). In a letter of reprimand to claimant following its investigation, the employer directed him not to touch students' shoulders or hair, and admonished him regarding other job performance issues, namely, deficiencies in his responsiveness to radio communications. (Ex. 50). However, the letter concluded that the specific complaints that instigated the investigation could not be substantiated. (Ex. 50-4). It explained that the reprimand was based on claimant's admission during the investigation that he would sometimes put an arm around students' shoulders, or touch their hair in jest or horseplay. (*Id.*) In support of this determination, the letter also documented that several teachers at claimant's former school had seen him put his arm around female students, and touch their hair. (Ex. 50-3).

We conclude that the employer's investigation (along with the administrative leave and resulting discipline) is properly considered a job performance evaluation or disciplinary action under ORS 656.802(3)(b). *See, e.g., Katharine S. Tatum*, 58 Van Natta 1774, 1777 (2006); *David B. Koeppling*, 46 Van Natta 751, 753 (1994) (the employer's investigation and resulting disciplinary actions are one causal factor). We next consider whether the employer's actions (the investigation and reprimand) were "reasonable," beginning with the employer's investigation regarding the student complaints. Based on the following reasoning, we conclude that the employer's actions were reasonable.

Three female students filed complaints regarding claimant alleging that he made them uncomfortable by touching their shoulders and their hair, whispering to them and gazing inappropriately at one of them. (Ex. 50-1, -2). When questioned regarding the student's allegations, claimant denied them, but also acknowledged putting his arm around the shoulders of other female students and touching their hair in "jest or horseplay." (Ex. 50-3).

Mr. Weatheroy testified that, after the statements of the students had been obtained, and after claimant denied the allegations, he needed to conduct additional interviews to obtain further evidence regarding the conflicting statements. (II-Tr. 140). Mr. Weatheroy indicated that he spoke with at least seven other people, some of them from claimant's former school. (*Id.*) He did not tell the individuals that claimant had "inappropriately touched" students, but told them that he was conducting a "confidential investigation regarding some potential allegations of misconduct." (II-Tr.141). Mr. Weatheroy's investigation led to interviews with multiple co-workers of claimant, who stated that they saw him put his arms around female students and touch their hair, as well as other allegations that claimant denied and for which he was not ultimately reprimanded. (Ex. 50-3).

After conducting our review of the record, we are persuaded that the employer's investigation was limited to interviews of students who filed complaints, claimant, and school district co-workers who were informed that the investigation was confidential. Given the nature of the allegations, we consider it reasonable for the employer to have conducted an investigation, which included interviewing co-workers who were in a position to observe claimant's interactions with students.

While claimant contends otherwise, we are not persuaded that the rumors regarding him were a result of the investigation and any alleged lack of safeguards. Instead, our review of the record indicates that it is more likely that any such rumors arose from the "sex tape" news story involving claimant's school. In reaching this conclusion, we note that Mr. Holt, claimant's long-time acquaintance, testified that speculation concerning claimant's involvement in the "sex tape" matter arose from his administrative leave shortly after the news story issued. (I-Tr. 79).

We proceed to examine the employer's decision to place claimant on administrative leave. The employer's senior labor relations manager testified that claimant was placed on administrative leave so that an investigation into the students' complaints could proceed without interference, in compliance with the school district's protocol. (II-Tr. 65). This explanation is not persuasively contradicted or rebutted. Furthermore, the record neither establishes nor suggests that the administrative leave policy is unreasonable, or that it was unreasonably applied to claimant.

Based on our review, the record supports a conclusion that the employer's investigation, including its decision to place claimant on administrative leave, was reasonable. As such, the employer's investigation/administrative leave decision, as well as its reprimand, were reasonable disciplinary and/or job performance evaluation actions, and are therefore, excluded work-related factors. *See* ORS 656.802(3)(b); *Reginald Cuffee*, 53 Van Natta 747, 753 (2001) (finding that the employer's disciplinary action considered as a whole, was reasonable).⁴

⁴ Additionally, we would consider claimant's administrative leave to be a reasonable "cessation of employment," and therefore, an excludable work-related factor. *See* ORS 656.802(3)(b); *Kip S. Helm*, 45 Van Natta 1539, 1540 (1993). The employer's labor relations manager testified that, in accordance with district protocol, claimant was placed on administrative leave so that an investigation regarding the student complaints could be completed without potential interference. (II-Tr. 65).

We turn to the physician's opinions. Dr. Friedman specifically cited the employer's investigation and decision to place claimant on administrative leave as a causative factor leading to claimant's mental disorder. (Ex. 46-5). Additionally, Dr. Friedman inaccurately believed that claimant was "removed from the workplace without evidence of wrongdoing." (*Id.*) Because Dr. Friedman attributed claimant's mental disorder, in part, to an excluded work-related factor, her opinion does not persuasively establish claimant's burden of proof. *See Lewno*, 66 Van Natta at 2076 (medical opinion that considered a "statutorily excluded" factor in analyzing the claimant's mental disorder was insufficient to establish a compensable claim).

Similarly, Dr. Hayes considered the multiple allegations against claimant, the resulting investigation and the administrative leave to have contributed to his mental disorder. (Ex. 54-11, -13, -21, -28, -29). As explained above, statutorily excluded contributory factors cannot be considered by a physician's opinion in support of a claimed mental disorder.

Accordingly, the physician's opinions on which claimant relies do not establish the compensability of his claim. Therefore, based on the foregoing reasoning, we affirm the ALJ's order upholding the employer's denial.

ORDER

The ALJ's order dated April 7, 2016 is affirmed.

Entered at Salem, Oregon on March 3, 2017