

In the Matter of the Compensation of
SHERRILL J. VAUGHN, Claimant

WCB Case No. 16-03920

ORDER ON REVIEW

Jodie Phillips Polich, Claimant Attorneys

H Thomas Andersen, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Poland'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 adopt and affirm the ALJ's order with the following supplementation.

Claimant began working for the employer as a deputy sheriff in 1997. (Ex. 48).

On December 15, 2015, claimant told her supervisor that a co-worker was "lazy;" specifically, she claimed that he was coming into work late, leaving early, and not participating in daily work activity. (Ex. N-1; Tr. II-97). When the co-worker denied the allegations, claimant told her supervisor that he was lying, but she did not corroborate her claims. (Ex. N-1; Tr. II-98). When her supervisor recalled similar allegations that she had made regarding another co-worker, claimant stated that she was being harassed and discriminated against because of her age and gender. (Ex. N-1; Tr. II-99, -100). The supervisor reported these issues to the employer's human resources office. (Ex. N-1).

On December 29, 2015, an analyst from the employer's human resources office interviewed claimant and the accused co-worker to assess whether there had been a violation of the employer's non-discrimination policy. (Ex. 22-2). Claimant told the analyst that the co-worker was a bully and used an obscenity in addressing her. (*Id.*) She described her co-workers in general as a "young crowd," who were "all very close and would never tell the truth about what [the accused co-worker] had done to her." (*Id.*) Ultimately, however, claimant stated that she did not think that she had been discriminated against. (Ex. 22-3). The accused co-worker acknowledged that he had used obscene language in addressing claimant and that such language was inappropriate at the workplace. (*Id.*) The analyst found no evidence that the co-worker had violated the employer's non-discrimination policy. (Ex. 22-4).

During the interview, claimant renewed her allegations about the co-worker coming to work late/leaving early and engaging in other misconduct. (Ex. 22-3). The co-worker denied the allegations and claimed that he only left work early or came in late during scheduled approved times. (*Id.*) He also stated that he did not trust claimant because of what he considered to be false allegations. (*Id.*)

Immediately after the interviews, the analyst asked claimant, her supervisor, and the accused co-worker to attend a “team support” meeting to resolve the issues between claimant and the accused co-worker. (*Id.*) During the meeting, the analyst concluded that claimant “had initially and deliberately misled [her supervisor] into believing [that the co-worker] had been late and left early for non-work related reasons.” (*Id.*) The analyst recommended that the employer conduct a “professional standards” investigation as “the statements and allegations made by [claimant] appear to be without merit and highly inconsistent in nature.” (Ex. 22-4).

On January 11, 2016, the employer initiated an investigation to determine whether claimant had violated its standard of conduct/personnel rules and whether there was cause for disciplinary action. (Ex. 26A-1).

On January 21, 2016, claimant told Dr. Robinson, her primary care physician, that she had hives from increased stress at work, she had missed work due to low blood pressure, and would need “FMLA [Family Medical Leave Act] filled out again.” (Ex.25-1).

On February 23, 2016, claimant was interviewed by the employer’s investigator. (Ex. H-1, -112). She asserted that the human resources analyst “turned” on her for reporting the co-worker’s inappropriate use of an obscenity. (Ex. H-116). The investigator subsequently interviewed the human resources analyst, the accused co-worker, claimant’s supervisor, and other employees who “had either firsthand knowledge of the accusations against [claimant] or were around at the time when the violations allegedly occurred.” (Exs. O, T, 26-5, -18).

In his March 17, 2016 report, the investigator noted that claimant was inconsistent in her recollection and the evidence showed that she “deliberately fabricated events each time she was linked to a specific violation, or violations, which could have potentially implicated her.” (Ex. 26-13). The investigator reported that claimant was known to be “a dishonest, untruthful person, who constantly gossips and changes her story without a sense of right and wrong.” (Ex. 26-13). He concluded that, with the exception of the accused co-worker’s

use of “improper language,” claimant’s allegations against the co-worker were unfounded.¹ (Ex. 26-12, -13). The investigator ultimately determined that claimant had violated the employer’s “professional conduct” policies. (Ex. 26-13, -14).

In April and May 2016, Dr. Robinson treated claimant for muscle pain/tightness. (Exs. 29, 30, 31). In June 2016, Dr. Robinson prescribed medication for claimant’s “anxiety,” and signed her family medical leave application based, in part, on her inability to function in the “work stress environment.” (Exs. 37-2, 39-2).

On May 9, 2016, claimant began treating with Dr. Silvey, a psychologist. (Ex. 32). Dr. Silvey diagnosed post-traumatic stress disorder (PTSD)/anxiety. (Ex. 51-1).

On July 28, 2016, claimant submitted a workers’ compensation claim for “mental health/stress (anxiety, adjustment disorder, PTSD) causing physical limitations bilaterally in upper extremities due to inflammation,” resulting from “discrimination (age and gender), retaliation (whistleblower), abusive/obscene language, and humiliation from supervisors and co-workers.” (Ex. 48).

On July 29, 2016, the employer denied that claimant had a compensable mental disorder. (Ex. 49). Claimant requested a hearing.

On January 23, 2017, Dr. Silvey opined that claimant’s migraines, vision problems, muscle tension, and problems with concentration were characteristic of PTSD. (Ex. 76-1). He administered psychological tests, which, in his opinion, were “consistent with the ongoing research of PTSD.” (*Id.*) He concluded that claimant had experienced “highly stressful and frightening events” at the workplace, which led to PTSD. (Ex. 76-2).

On February 15, 2017, Dr. Turco, a psychiatrist who performed an examination at the employer’s request, opined that claimant’s stress was not a bona fide psychiatric disorder. (Ex. 77-13). Dr. Turco asserted that claimant did not meet the criteria for PTSD (*i.e.*, a near death experience or an experience that might cause bodily harm) or have its symptoms (which generally include difficulties with daily activities and relating to friends). (Exs. 77-15, 78-4).

¹ The investigator determined that the accused co-worker informed his supervisors in advance and had their approval before leaving work early or arriving late. (Ex. 26-12).

Dr. Silvey testified that the February 23, 2016 interview “triggered” claimant’s preexisting PTSD and was the major contributing cause of a combining and pathological worsening.² (Tr. I-192, -195, -204, -239, -240).

In upholding the employer’s denial, the ALJ identified medical causation as the dispositive issue. The ALJ determined that the employer’s investigation/ February 23, 2016 interview was a reasonable disciplinary, corrective, or job performance evaluation action within the meaning of ORS 656.802(3)(b). Accordingly, the ALJ reasoned that the stress associated with those events could not be considered in determining whether work was the major contributing cause of the claimed mental disorder. Because Dr. Silvey considered those statutorily excluded work stressors in reaching his causation opinion, the ALJ found that his opinion did not establish the requisite medical causation. *See Liberty Northwest Ins. Corp. v. Shotthafer*, 169 Or App 556, 565-66 (2000) (major contributing cause is established if the nonexcluded work factors contributed more to the claimed mental disease than excluded work factors and nonwork-related factors combined).

On review, claimant contends that the February 23, 2016 interview and the underlying investigation were not reasonable disciplinary, corrective, or job performance actions under ORS 656.802(3)(b). Thus, according to claimant, Dr. Silvey’s opinion persuasively established the compensability of her mental disorder claim. For the following reasons, we disagree with claimant’s contentions.

Generally, to establish the compensability of an occupational disease claim, a claimant must prove that employment conditions were the major contributing cause of the disease. ORS 656.266(1); ORS 656.802(2)(a). If the claim is based on the worsening of a preexisting disease, the claimant must prove that employment conditions were the major contributing cause of the combined condition and pathological worsening of the disease. ORS 656.802(2)(b).

Additionally, where the occupational disease claim is for a mental disorder, 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 those generally inherent in every working situation or reasonable

² In 2003, claimant received treatment for PTSD after she was strangled by a male inmate. (Exs. 9, 10, 11).

disciplinary, corrective, or job performance evaluation actions by the employer, or cessation of employment or employment decisions based on ordinary business or financial cycles. ORS 656.802(3)(b). Finally, 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 determining the major contributing cause of a condition, a medical expert must weigh the relative contribution of each cause. *Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994), *rev dismissed*, 320 Or 416 (1995). In the context of a mental disorder claim, both the 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 factors outweigh all other causes combined is the claim compensable. *Shothafer*, 169 Or App at 565-66. A medical opinion that does not factor out contributory, but statutorily excluded, factors is insufficient to establish a compensable mental disorder. *See Rory S. Lewno*, 66 Van Natta 2075, 2076 (2014).

Here, Dr. Silvey opined that claimant’s combined and worsened PTSD condition was caused in major part by the February 23, 2016 interview. (Tr. I-239, -240). He explained that claimant “felt like she was under interrogation” for reporting improper language at the workplace. (Tr. I-196). Acknowledging that the interview would not have caused PTSD without the event in 2003, he concluded that the interview “triggered [the preexisting PTSD] coming back out.” (Tr. I-240). For the following reasons, we agree with the ALJ’s decision that the February 23, 2016 interview was an “excluded” work-related factor under ORS 656.802(3)(b), and, therefore, Dr. Silvey’s opinion did not satisfy claimant’s burden to prove that nonexcluded work-related factors were the major contributing cause of her disease.

The reasonableness of an employer’s actions must be decided on a case-by-case basis, taking into account the particular facts of the case. *See Melody M. Spiker*, 64 Van Natta 1268, 1270 (2012); *Janice E. Ingersoll*, 48 Van Natta 100, 101 (1996); *David E. Koeppling*, 46 Van Natta 751, 752-53 (1994). In *Ingersoll* and *Koeppling*, we treated the employer’s investigation and resulting disciplinary action as one causal factor. *See also Reginald Cuffee*, 53 Van Natta 747, 751 (2001) (declining to “parse” the employer’s action into various phases of the disciplinary process).

Claimant argues that she was not disciplined as a result of the interview/investigation.³ Yet, our analysis is not dependent on whether or not the employer's investigation resulted in disciplinary action. *See Troy L. Berry*, 69 Van Natta 381, 386 (2017) (concluding that the employer's investigation was properly considered a job performance evaluation or disciplinary action under ORS 656.802(3)(b) even though it did not substantiate the initiating complaints).

Here, the employer's investigation/interview were undertaken to determine whether there was a cause for disciplinary action. (Ex. 26A-1). Accordingly, the employer's investigation/interview are properly considered to be "disciplinary, corrective, or job performance evaluation actions," regardless of whether or not they resulted in disciplinary action. *Id.*

Claimant also contends that the purpose of the investigation/interview was not to evaluate her job performance; rather, it was in retaliation for her report of the co-worker's violations, which was an unlawful employment practice under ORS 659A.203(1)(b)(A), and, as a matter of law, cannot be considered. We disagree.

The record shows that the human resources analyst's referral for an investigation was based on claimant's statements and allegations about a co-worker, which "appear[ed] to be without merit[.]" (Ex. 22-4). The analyst thought that claimant had "initially and deliberately misled [her supervisor] into believing that [the accused co-worker] had been late and left early for non-work related reasons." (Ex. 22-3).

The stated purpose of the ensuing investigation was to determine whether claimant had violated the employer's personnel rules or "standard of conduct," such that there was cause for disciplinary action. (Ex. 26A-1). The employer's personnel rules provided for disciplinary action for conduct that "reflects discredit upon [the employer] or a[n] employee or is a direct hindrance to the effective performance of [the employer's] functions." (Ex. 26A-13). The employer's "standard of conduct" provided that employees may be subject to disciplinary processes for making a false or inaccurate statement in an oral or written report.

³ The ALJ admitted, over the employer's "relevancy" objection, testimonial and documentary evidence about claimant's August 2016 employment termination and subsequent reinstatement. Afterward, considering that Dr. Silvey's opinion only relied on work events and conditions up to and including the February 23, 2016 interview, the ALJ excluded that evidence. The ALJ's evidentiary rulings have not been contested on review.

(*Id.*) Employees were also required to maintain cooperative working relationships with other employees, treat all persons with respect and courtesy, and tell the truth/include all relevant facts. (Ex. 26A-13, -14).

Under these circumstances, we conclude that it was reasonable for the employer to initiate an investigation to determine whether there was a cause for disciplinary action based on its human resources analyst's report that claimant had made statements and allegations about a co-worker that appeared to be without merit.⁴

Claimant argues that the employer's investigation was of her character/honesty, not her work performance. Yet, the record shows that her duties included testifying in court. (Ex. 26A-23). The investigator concluded that evidence of claimant's untruthfulness could ultimately lead to her court testimony, reports, and statements being discredited and "exculpatory to the defense." (*Id.*)

Claimant also asserts that the February 23, 2016 interview was unreasonable based on the manner in which it was conducted. She argues that the investigator "ordered" her to answer questions and that his voice, tone, and volume were designed to intimidate her. She contends that her subjective response to the interview is critical to our analysis under ORS 656.802(3). We disagree.

Based on our review of the interview, we concur with the ALJ's assessment. However, even assuming that claimant's reaction to the interview was based on an accurate perception of real events, we would find that the employer's disciplinary action as a whole was reasonable. In this regard, we do not necessarily accord equivalent weight to each stage of the disciplinary action, but rather view the reasonableness of the employer's action as a whole. *See Cuffee*, 53 Van Natta 751-52 (finding that the disciplinary action as a whole was reasonable even assuming that the employer did not conduct an entirely reasonable investigation).

⁴ We decline to go beyond the confines of ORS Chapter 656 and consider employment statutes (ORS Chapter 659A) or "personnel administration fundamentals" in determining whether the employer's investigation was a reasonable disciplinary, corrective or job performance evaluation action under ORS 656.802(3)(b). *See Kenneth A. Meyer*, 50 Van Natta 2302, 2304 (1998) (issues concerning whether an employer's action in terminating a claimant's employment was unlawful are not within the purview of the workers' compensation law or appropriately considered in determining whether a worker was terminated for a work rule violation or other disciplinary reasons under ORS 656.325(5)(b)); *Glenda Jensen*, 50 Van Natta 1074, 1075 n 1 (1998) (no jurisdiction to consider matters arising outside of Chapter 656, including employment reinstatement disputes under Chapter 659).

For the foregoing reasons, as well as those provided in the ALJ's order, we conclude that the employer's investigation/interview qualifies as an excluded work factor under ORS 656.802(3)(b). Because no medical evidence supported a causal relationship between claimant's mental condition and her employment conditions without relying on the excluded work factor, the record does not establish a compensable mental disorder. *See* ORS 656.266(1); ORS 656.802(3)(b); *Shothafer*, 169 Or App at 565; *Cuffee*, 53 Van Natta at 752. Therefore, we affirm.⁵

ORDER

The ALJ's order dated June 5, 2017 is affirmed.

Entered at Salem, Oregon on March 6, 2018

⁵ Because Dr. Silvey's opinion did not establish medical causation under *Shothafer*, it is unnecessary to address the parties' arguments regarding the other statutory requirements for a compensable mental disorder claim.