WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CARLOS REYES, *Applicant*

vs.

PALM DESERT DOORS AND HARDWARE; PRAETORIAN INSURANCE COMPANY; *Defendants*

Adjudication Numbers: ADJ8349042
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Applicant sought reconsideration of the August 30, 2022 Findings and Order ("F&O"), wherein the workers' compensation administrative law judge (WCJ) concluded that defendant employer did not engage in serious and willful misconduct under Labor Code sections 4553 and 4553.1.[2] Applicant contends the WCJ erred because the evidence establishes that (1) Victor Ortega was a managing representative under the meaning of section 4553.1, and (2) applicant established violations of two separate safety orders pursuant to that same code section.

We received an Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&O, because we agree with applicant that Victor Ortega was a managing representative under the meaning of section 4553.1, and we believe the matter should be returned to the WCJ for further analysis and/or development of the record as necessary in light of this conclusion.

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[1] Commissioner Sweeney, who was on the panel that granted reconsideration, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

[2] Further references are to the Labor Code unless otherwise specified.

FACTS AND PROCEDURAL HISTORY

Applicant filed an Application for Adjudication, alleging injuries sustained while employed by defendant as a carpenter. Applicant later filed a petition for increased compensation ("S&W petition"), pursuant to Labor Code section 4553, on the basis that his injury was attributable to serious and willful misconduct on the part of his employer. On March 10, 2016, a WCJ issued an Order Approving Compromise and Release, resolving applicant's underlying claim of injury, but not the petition for increased compensation for serious and willful misconduct.

The matter initially proceeded to trial on March 22, 2017 and May 9, 2017. Applicant testified extensively about the circumstances surrounding his injury. On March 29, 2012, applicant was employed as a carpenter at a residential site, doing woodwork; he had been working at the site for two to three months before his injury. (MOH/SOE 3/22/2017 at pp. 4–5.) He used various power tools to cut wood as part of his job duties, including a table saw. (*Id.* at p. 5.) He was skilled at using these power tools, attended regular safety meetings every one to two months, and had been working for his employer for 11 years. (*Ibid.*)

Applicant's immediate supervisor was Victor Ortega. (*Id.* at p. 4.) Ortega was at the work site eight hours a day, and was on the site at the time of applicant's injury. (*Id.* at pp. 4, 6.) Ortega provided gloves to applicant to use, because the owner had said he did not want fingerprints on the expensive imported wood they were using for part of the construction job. (*Id.* at p. 5.) Applicant testified that the gloves were "a little loose," and made it harder to operate the table saw because he was unable to feel the grain of the wood. (*Id.* at pp. 5–6.) Applicant never objected to anyone about having to wear the gloves. (*Id.* at p. 7.)

On the date of injury, applicant was using a table saw owned by Ortega. (*Id.* at p. 5.) There was no guard on the table saw; applicant did not know who had removed the guard or if the guard was kept somewhere on-site. (*Id.* at p. 5, 7.) Applicant was cutting wood for a ceiling installation, which involved several types of cuts: angled cuts of the imported wood and straight cuts of pine two-by-fours used for backing. (*Id.* at pp. 5, 7.) He could have done the angled cuts using the jigsaw instead, but it would have taken too long. (*Id.* at p. 5.) Angled cuts cannot be done with the guard on the saw. (*Id.* at p. 7.) They did not have push-tools on site, but they did have pieces of wood that could be used to push the wood through the saw. (*Id.* at pp. 7–9.)

At the time of injury, applicant was cutting a pine two-by-four. (*Id.* at pp. 6–7.) The two-by-four lifted or "kicked back," caught on his glove, and pulled his hand into the saw, causing

serious injury. (*Id.* at p. 6, 8.) He was not using a push tool or piece of wood. (*Id.* at p. 9.) He had not been told to use a push tool or piece of wood, and he had never had a piece of wood kick back on him before. (*Id.* at p. 8.)

Mario Garcia, another carpenter on the worksite, testified that Ortega assigned the jobs and inspected the work. (*Id.* at p. 10.) He also used Ortega's table saw; there was no guard attached, and he didn't know if a guard was available. (*Ibid.*) He confirmed that they were given gloves to wear while cutting the imported wood, that the gloves made it more difficult to work, and that it was not practical to remove the gloves when cutting the backing. (*Id.* at pp. 10–11.) Garcia also testified that push tools were not used when cutting two-by-fours and that they could not be. (*Id.* at pp. 11–12.)

Ortega also testified at trial. Ortega served as lead installer at the job site, and got directions from the building site manager. (*Id.* at p. 13.) Ortega had been the lead on this particular job for about two years; he was the go-between between the builder and the crew, but the crew was the employer's crew, not his crew. (MOH/SOE 5/9/17 at p. 3.) He did supervise the installers, and his job duties included making sure they did what they were supposed to be doing and took breaks at appropriate times. (*Id.* at pp. 3–4.) Part of his job was making sure that the installers were doing the job properly, which involved correcting people who were improperly using tools. (*Id.* at p. 4.) He had seen applicant use tools improperly before, but not at this job site. (*Id.* at p. 6.) Ortega agreed that safety meetings were mandatory; he did not remember the contents of the meeting that occurred on "3/10" [presumably 2012], but he agreed with the guidance that guards should be used on power tools generally. (*Id.* at p. 4.)

Ortega confirmed that he bought and distributed gloves for use when cutting imported wood, at the request of the owner. (MOH/SOE 3/22/2017 at p. 13.) The workers were only required to wear gloves when cutting the imported wood. (MOH/SOE 5/9/17 at p. 6.) The guard on Ortega's saw had been removed, and Ortega testified it was stored in his work van; the workers knew the van was open during the day. (MOH/SOE 3/22/17 at p. 14.) Ortega stated that applicant owned a table saw and that it did not have a guard either, that applicant was one of the more experienced carpenters, and that wooden push tools were available on site for use with the saw. (*Ibid.*) He confirmed that some of the cuts being made at the work site could not be made with the guard installed on the saw. (*Ibid.*) The only reason they used the table saw was to make dado cuts

that could not be made with a guard. (MOH/SOE 5/9/17 at p. 6.) There was no safer way to make these kinds of cuts. (*Ibid.*)

Applicant's attorney attempted to ask Ortega "several questions with regard to Cal/OSHA that were objected to and were sustained." (*Id.* at p. 5.) Evidence was admitted without objection, and the matter was taken under submission. (*Id.* at p. 1.)

On May 19, 2017, the WCJ issued a Findings and Order ("Prior F&O"), finding that the employer did not engage in serious and willful misconduct under the meaning of Labor Code section 4553. (Prior F&O, at p. 1–2.)

Applicant filed a Petition for Reconsideration ("First Petition"), which we granted on July 20, 2017. On November 25, 2019, we issued our Decision After Reconsideration, finding that the Prior F&O appeared to be based in part on factual errors, and that the WCJ had erroneously prevented applicant from introducing testimony related to the alleged violation of two Cal/OSHA safety orders that could have provided an alternative path to finding a serious and willful violation pursuant to section 4553.1. We therefore rescinded the Prior F&O, and returned the matter to the trial level for further proceedings.

Back at the trial level, the matter was reassigned to a new WCJ based on the prior WCJ's retirement. After various proceedings, the parties ultimately returned for a further hearing on July 6, 2022 in order to present evidence related to the Cal/OSHA safety order theory of liability. (MOH/SOE, 7/6/2022, at p. 2.) Ortega was the only witness to testify at this hearing.

At the July 6, 2022 hearing, Ortega testified that he was familiar with Cal/OSHA, and that he was aware that Cal/OSHA safety rules require the use of a guard on all table saws. (*Id.* at p. 2.) The guard on the table saw applicant was injured using was removed because they were doing dado cuts that could not be done with the guard. (*Ibid.*) He did not know if applicant was doing a dado cut at the time of the injury, but he knew applicant was cutting a 2x4, and gloves did not have to be used when cutting the 2x4s. (*Id.* at p. 4.) Applicant could have removed the gloves and gone to get the guard that was in Ortega's van when doing the cut if he had wanted to. (*Ibid.*) The gloves were to be used only when handling the finishing wood, not the 2x4s. (*Id.* at p. 5.) However, Ortega never specifically told the employees not to use the gloves when cutting other wood. (*Ibid.*)

Ortega testified that he was not familiar with the Cal/OSHA safety order prohibiting the use of gloves when there was a danger they could become tangled in heavy equipment. (*Id.* at p. 3.) Applicant did not tell Ortega that his gloves got caught in the machinery, saying instead that

the piece of wood kicked back on him, but Ortega was not present at the time of the injury. (*Ibid.*) He bought and distributed three sizes of gloves; he did not make sure that the gloves fit properly and he did not consider the gloves a safety hazard. (*Ibid.*) Applicant did not tell him that the gloves fit badly. (*Id.* at p. 4.) There were also push tools available that applicant could have used to push the wood through the saw while keeping his hands further from the blade. (*Ibid.*)

Shortly after the accident, Ortega attended a safety meeting, which was not specific to applicant's injury or prompted by it. (*Id.* at pp. 3, 5.) He "may have recalled" a meeting where they discussed the need to use guards on the machinery. (*Ibid.*) Ortega did not train the applicant, and stated he was not in charge of overseeing safety. (*Ibid.*) Safety was everyone's responsibility, and Ortega did not feel he had personal responsibility for the safety of his co-workers. (*Ibid.*) He was in charge of advising the workers on what they were supposed to be doing. (*Ibid.*) There was a general contractor on site; he took his orders from the general contractor. (*Id.* at p. 4.)

Ortega had been told applicant had 15 years of experience; he was one of the most experienced workers on the job and had more experience than Ortega. (*Ibid.*) Applicant's injury was the first of its kind with the company. (*Ibid.*)

After receiving Ortega's testimony, the WCJ took the matter under submission. (*Id.* at p. 1.) On August 30, 2022, the WCJ issued his F&O, finding that the use of gloves was a proximate cause of applicant's injury and violated a Cal/OSHA safety order, but that Ortega was not a managing representative of defendant, and that the conditions making the safety order applicable were not obvious and that the safety order was not knowingly violated by defendant. (F&O, at ¶¶ 2–5.) Accordingly, the WCJ found that there was no good cause to grant the S&W petition. (*Id.* at ¶ 6.) The appended Opinion on Decision states that the WCJ believed that the lack of a guard on the saw was not a proximate cause of applicant's injury. (Opinion on Decision, at p. 5.)

This Petition for Reconsideration followed.

DISCUSSION

I.

Only the Appeals Board is statutorily authorized to issue a decision on a petition for reconsideration. (Lab. Code, §§ 112, 115, 5301, 5901, 5908.5, 5950; see Cal. Code Regs., tit. 8,

§§ 10320, 10330.)[3] The Appeals Board must conduct de novo review as to the merits of the petition and review the entire proceedings in the case. (Lab. Code, §§ 5906, 5908; see Lab. Code, §§ 5301, 5315, 5701, 5911.) Once a final decision by the Appeals Board on the merits of the petition issues, the parties may seek review under Labor Code section 5950, but appellate review is limited to review of the record certified by the Appeals Board. (Lab. Code, §§ 5901, 5951.)

Former Labor Code section 5909 provided that a petition was denied by operation of law if the Appeals Board did not "act on" the petition within 60 days of the petition's filing with the 'appeals board' and not within 60 days of its filing at a DWC district office. A petition for reconsideration is initially filed at a DWC district office so that the WCJ may review the petition in the first instance and determine whether their decision is legally correct and based on substantial evidence. Then the WCJ determines whether to timely rescind their decision, or to prepare a report on the petition and transmit the case to the Appeals Board to act on the petition. (Cal. Code Regs., tit. 8, §§ 10961, 10962.)[4] Once the Appeals Board receives the case file, it also receives the petition in the case file, and the Appeals Board can then "act" on the petition.

If the case file is never sent to the Appeals Board, the Appeals Board does not receive the petition contained in the case file. On rare occasions, due to an administrative error by the district office, a case is not sent to the Appeals Board before the lapse of the 60-day period. On other rare occasions, the case file may be transmitted, but may not be received and processed by the Appeals Board within the 60-day period, due to an administrative error or other similar occurrence. When the Appeals Board does not review the petition within 60 days due to irregularities outside the petitioner's control, and the 60-day period lapses through no fault of the petitioner, the Appeals

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[3] The use of the term 'appeals board' throughout the Labor Code refers to the Appeals Board and not a DWC district office. (See e.g., Lab. Code, §§ 110, et. seq. (Specifically, § 110 (a) provides: "'Appeals board' means the Workers' Compensation Appeals Board. The title of a member of the board is 'commissioner.'").) Section 111 clearly spells out that the Appeals Board and DWC are two different entities.

[4] Petitions for reconsideration are required to be filed at the district office and are not directly filed with the Appeals Board. (Cal. Code Regs., tit. 8, § 10995(b); see Cal. Code Regs., tit. 8, § 10205(l) [defining a "district office" as a "trial level workers' compensation court."].) Although the Appeals Board and the DWC district office are separate entities, they do not maintain separate case files; instead, there is only <u>*one*</u> *case file*, and it is maintained at the trial level by DWC. (Cal. Code Regs., tit. 8, § 10205.4.)

When a petition for reconsideration is filed, the petition is automatically routed electronically through the Electronic Adjudication Management System (EAMS) to the WCJ to review the petition. Thereafter, the entire case file, *including the petition for reconsideration*, is then electronically transmitted, i.e., sent, from the DWC district office to the Appeals Board for review.

Board must then consider whether circumstances exist to allow an equitable remedy, such as equitable tolling.

It is well-settled that the Appeals Board has broad equitable powers. (*Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board* (1978) 83 Cal.App.3d 413, 418 [43 Cal.Comp.Cases 785] citing *Bankers Indem. Ins. Co.* v. *Indus. Acc. Com*. (1935) 4 Cal.2d 89, 94-98 [47 P.2d 719]; see *Truck Ins. Exchange v. Workers' Comp. Appeals Bd. (Kwok)* (2016) 2 Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685]; *State Farm General Ins. Co. v. Workers' Comp. Appeals Bd. (Lutz)* (2013) 218 Cal.App.4th 258, 268 [78 Cal.Comp.Cases 758]; *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [59 Cal.Comp.Cases 96].) It is an issue of fact whether an equitable doctrine such as laches applies. (*Kwok*, *supra* 2 Cal.App.5th at p. 402.) The doctrine of equitable tolling applies to workers' compensation cases, and the analysis turns on the factual determination of whether an opposing party received notice and will suffer prejudice if equitable tolling is permitted. (*Elkins v. Derby* (1974) 12 Cal.3d 410, 412 [39 Cal.Comp.Cases 624].) As explained above, only the Appeals Board is empowered to make this factual determination.[5]

In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced, especially in light of the fact that the Appeals Board had repeatedly assured the petitioner that it would rule on the merits of the petition. (*Id.*, at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Ibid.*) The touchstone of the workers' compensation system is our constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.) "Substantial justice" is not a euphemism for inadequate justice. Instead, it is an exhortation that

[5] Labor Code section 5952 sets forth the scope of appellate review, and states that: "Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence." (Lab. Code, § 5952; see Lab. Code, § 5953.)

the workers' compensation system must focus on the *substance* of justice, rather than on the arcana or minutiae of its administration. (See Lab. Code, § 4709 ["No informality in any proceeding . . . shall invalidate any order, decision, award, or rule made and filed as specified in this division."].)

With that goal in mind, all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) If a timely filed petition is never considered by the Appeals Board because it is "deemed denied" due to an administrative irregularity not within the control of the parties, the petitioning party is deprived of their right to a decision on the merits of the petition. (Lab. Code, §5908.5; see *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350]; *LeVesque, supra* 1 Cal.3d 627, 635.) Just as significantly, the parties' ability to seek meaningful appellate review is compromised, raising issues of due process. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra,* 68 Cal.2d 753.)

Substantial justice is not compatible with such a result. A litigant should not be deprived of their due process rights based upon the administrative errors of a third party, for which they bear no blame and over whom they have no control. This is doubly true when the Appeals Board's action in granting a petition for reconsideration has indicated to the parties that we will exercise jurisdiction and issue a final decision on the merits of the petition, and when, as a result of that representation, the petitioner has forgone any attempt to seek judicial review of the "deemed denial." Having induced a petitioner not to seek review by granting the petition, it would be the height of injustice to then leave the petitioner with no remedy.

In this case, the WCJ issued the Findings and Award on August 30, 2022, and applicant filed a timely petition on September 19, 2022. According to EAMS, the case file was transmitted to the Appeals Board on October 4, 2022. However, for reasons that are not entirely clear from the record, the Appeals Board did not actually receive notice of and review the petition until November 21, 2022. Accordingly, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. The Appeals Board granted the petition on November 21, 2022, the same day it became aware of it. In so doing, we sent a clear signal to the parties of our intention to exercise jurisdiction and issue a final decision after reconsideration. Neither party expressed any opposition to this course of action, and it appears clear from the fact that neither

party sought judicial review of our grant of reconsideration that both parties have acted in reliance on our grant.

Under the circumstances, the requirements for equitable tolling have been satisfied in this case. Accordingly, our time to act on defendant's petition was equitably tolled until 60 days after November 21, 2022. Because we granted the petition on November 21, 2022, our grant of reconsideration was timely, and we may issue a decision after reconsideration addressing the merits of the petition.

II.

Labor Code section 4553 states:

The amount of compensation otherwise recoverable shall be increased one–half, together with costs and expenses not to exceed two hundred fifty dollars ($250), where the employee is injured by reason of the serious and willful misconduct of any of the following:

(a) The employer, or his managing representative.

(b) If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent thereof.

(c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof.

Where a finding of serious and willful misconduct is based upon violation of a safety order, the findings must include: (1) the specific manner in which the order was violated, (2) the specific manner in which the violation of the safety order proximately caused the injury or death, and (3) that the safety order, and the conditions making the order applicable, were known to and violated by the employer or its representative, or that the condition was obvious and that the failure of the employer or representative to correct the condition constituted a reckless disregard for the probable consequences. (Lab. Code, § 4553.1.)

Serious and willful conduct is defined as conduct that "necessarily involves deliberate, intentional, or *wanton* conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, *that danger is likely to result therefrom*." (*Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d 102, 117 [18 Cal.Comp.Cases 3], emphasis in original.) "Wilfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences." (*Ibid.*)

"'Wilful misconduct' means something different from and more than negligence, however gross. The term 'serious and wilful misconduct' is described . . . as being something 'much more than mere negligence, or even gross or culpable negligence' and as involving 'conduct of a *quasi* criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences' . . . The mere failure to perform a statutory duty is not, alone, wilful misconduct. It amounts only to simple negligence. To constitute 'wilful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. . . ." (*Mercer-Fraser, supra,* at p. 117.)

In comparison, "Negligence is an unintentional tort, a failure to exercise the degree of care in a given situation that a reasonable man under similar circumstances would exercise to protect others from harm. (Rest. Torts, secs. 282, 283, 284; Prosser, Torts, secs. 30 et seq.) A negligent person has no desire to cause the harm that results from his carelessness, (Rest. Torts, sec. 282(c)), and he must be distinguished from a person guilty of willful misconduct, such as assault and battery, who intends to cause harm. (Prosser, Torts, p. 261.) Willfulness and negligence are contradictory terms. . . . [Citations.] If conduct is negligent, it is not willful; if it is willful, it is not negligent. It is frequently difficult, however, to characterize conduct as willful or negligent. A tort having some of the characteristics of both negligence and willfulness occurs when a person with no intent to cause harm intentionally performs an act so unreasonable and dangerous that he knows, or should know, it is highly probable that harm will result. (Rest. Torts, sec. 500 et seq.; Prosser, Torts, pp. 260, 261.) Such a tort has been labeled 'willful negligence,' 'wanton and willful negligence,' 'wanton and willful misconduct,' and even 'gross negligence.' It is most accurately designated as wanton and reckless misconduct. It involves no intention, as does willful misconduct, to do harm, and it differs from negligence in that it does involve an intention to perform an act that the actor knows, or should know, will very probably cause harm. . . . [Citations.] Wanton and reckless misconduct is more closely akin to willful misconduct than to negligence, and it has most of the legal consequences of willful misconduct." (*Mercer-Fraser, supra,* 40 Cal.2d at pp. 116-117.)

"The basis for serious and willful misconduct has been aptly summarized as including three alternatives: '(a) a deliberate act for the purpose of injuring another; (b) an intentional act with knowledge that serious injury is a probable result; or (c) an intentional act with a positive and

reckless disregard of its possible consequences.' [citation omitted] It follows that an employer guilty of serious and willful misconduct must know of the dangerous condition, know that the probable consequences of its continuance will involve serious injury to an employee, and deliberately fail to take corrective action." (*Johns-Manville Sales Corp. v. Workers' Compensation Appeals Bd.* (*Horenberger*) (1979) 96 Cal.App.3d 923, 933 [44 Cal.Comp.Cases 878] citing *Mercer-Fraser, supra,* 40 Cal.2d 102; *Hawaiian Pineapple Co.* v. *Ind. Acc. Com*. (1953) 40 Cal.2d 656 [18 Cal. Comp. Cases 94]; *Dowden* v. *Industrial Acc. Com.* (1963) 223 Cal.App.2d 124, 130-131 [1963 Cal. App. LEXIS 1507]; 2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1979) § 17.02 [2][a].)

Furthermore, "the minimum level of care required of the employer to avoid being found guilty of serious and willful misconduct is not constant. As the peril to the employee intensifies, the minimum level of care required by the employer rises. Inattention to lethal danger may constitute serious and willful misconduct, while inattention to a mild hazard may only constitute negligence." (1-10 Hanna, Cal. Law of Employee Injuries & Workers' Comp. (2017) § 10.01, citing *Dowden, supra,* 223 Cal.App.2d at 131 and *Johns-Manville, supra,* 96 Cal.App.3d at 934.)

For a conduct to be serious and willful, "the conduct must be with knowledge of the peril to be apprehended, or done with a positive and active disregard of the consequences." (*Hawaiian Pineapple, supra,* 40 Cal.2d at 663.) "A 'reckless disregard' of the safety of employees is not sufficient in itself unless the evidence shows that the disregard was more culpable than a careless or even a grossly careless omission or act. It must be an affirmative and knowing disregard of the consequences. Likewise, a finding that the 'employer knew or should have known had he put his mind to it' does not constitute a finding that the employer had that degree of knowledge of the consequences of his act that would make his conduct wilful. The standard requires an act or omission to which the employer *has* 'put his mind.'" (*Ibid.*)

Here, we initially note that the F&O includes specific findings with regard to violation of the Cal/OSHA safety order related to the use of gloves, and as to whether Ortega was a managing representative, but not as to the violation of the Cal/OSHA safety order related to the disabling of the guard on the saw. However, in the Opinion on Decision, the WCJ states that "the lack of a guard/hood was not the cause of applicant's injuries," and we will therefore treat that statement as effectively another finding of fact for purposes of the petition. (See Opinion on Decision, at p. 5.)

We first consider the WCJ's conclusion that Ortega was not a managing representative under the meaning of section 4553. An "'executive or managing officer' is 'a person in the corporation's employ, either elected or appointed, who is invested with the *general conduct and control* at a particular place of the business of a corporation.' (Italics added.) (*E. Clemens Horst Co. v. Industrial Acc. Com*. (1920), 184 Cal. 180, 190 [193 P. 105].) A 'managing agent or a managing representative is one who has *general discretionary powers of direction and control*—one who may direct, control, conduct or carry on his employer's business or any part or branch thereof.' (Italics added.) (*Gordon v. Industrial Acc. Com*. (1926), 199 Cal. 420, 427 [249 P. 849].)" [citation omitted.] 'While the terms of the … [statute] have been broadened with each amendment, the [Legislature has refrained from making the employer liable for the misconduct of every person exercising authority on the employer's behalf. On the contrary, the class of persons whose misconduct will result in the imposition of such liability still remains limited.' [citation omitted; internal quotation marks omitted.]" (*Bigge Crane & Rigging Co. v. Workers' Comp. Appeals Bd*. (2010) 188 Cal.App.4th 1330, 1342–1343 [116 Cal. Rptr. 3d 153, 75 Cal.Comp.Cases 1089]; emphasis in original.)[6]

The court in *Bigge Crane, supra*, made the distinction between a person who is in charge of an integral department of the employer's business and is invested with general discretionary power or direction and control of the department and a person whose supervisory authority is limited to the direction of the crew of one machine that performed a single detail of the overall job and who was not in charge of a part or branch of his employer's business. (*Bigge Crane, supra*, at p. 1342–1345.) The court deemed the former an "executive or managing officer" satisfying section 4553; the latter not. (*Ibid*.) The court therefore concluded that the crane operator in that case was not a managing officer of the corporation because the crane operator was responsible only for the operation of the individual crane the injured employee was assigned to, and therefore lacked general supervisory authority over all cranes, crane crews, or loading operations at the jobsite. (*Id.*, at p. 1345–46.) The court went on to note that the fact that an employee has supervisory authority over other employees does not necessarily make them a managing officer;

[6] Section 4553 uses several terms to refer to the same category of persons, depending on the form of the employer. If the employer is an individual, the statute uses the term "managing representative;" if the employer s a corporation, it uses the term "managing officer, or general superintendent." (§ 4553(a) &(c).) The WCJ used the term "managing representative" in the F&O, and we therefore follow that designation in this decision, but the legal question presented here does not depend on which specific term which applies.

the question is whether they exercised powers of general supervision over a distinct and separate part or division of the business. (*Id.* at pp. 1346–48.)

Here, the WCJ concluded that Ortega "appears to have provided more than direction to a handful of workers assigned to help with a specific task," noting that Ortega was in charge of making sure the crew showed up on time, did what they were supposed to do, took breaks, was the go-between between the employer's work crew and the builder, and the one who received instructions from the general contractor. (Opinion on Decision, at pp. 5–6.) However, the WCJ nevertheless concluded that Ortega was not a managing representative because there was "no evidence to suggest that Mr. Ortega had general discretionary powers of direction and control and could direct, control, conduct or carry on this employer's business." (*Id.* at p. 6.)

We disagree with the WCJ that Ortega was not a managing representative. The facts that Ortega was the one responsible for making sure the crew showed up on time, for assigning individual crew members to work on particular tasks, and for receiving instructions from the general contractor are all signs of general discretionary powers of direction and control. Unlike the crane operator in *Bigge Crane*, Ortega was not responsible for the operation of a single crane at a worksite with multiple crane crews; he was the employer's representative at the worksite, and responsible for making sure that the entirety of the employer's workforce at that jobsite was engaged in the tasks they were supposed to be engaging in. Moreover, Ortega was the one who told the employees to wear gloves when handling some of the wood, and the one who went to buy the gloves that the other employees were then required to wear. (MOH/SOE 3/22/2017 at p. 13.) He was also responsible for making sure the installers were using tools properly. (MOH/SOE 5/9/17 at p. 3.)

To be sure, Ortega was not the general supervisor of the entire worksite; that was the general contractor / building site manager, who defendant contracted with as a subcontractor. However, by his own testimony Ortega was the lead installer of the defendant's crew at the building site, and therefore the individual responsible for exercising direct supervisory authority and control over the integral unit of defendant's business that was at the jobsite. Nor did defendant point to any other individual in its employ with greater supervisory authority over the jobsite or over applicant who was present at the location. To analogize to *Bigge Crew*, Ortega here was not merely the operator of a single crane, he was the lead of all loading operations, which the court implied would have been a sufficiently supervisory role to meet the requirements of section 4553.

(See *Bigge Crew, supra,* at p. 1344–1345.) Under the circumstances, we believe the factual record sufficient to establish that Ortega was a managing representative under the meaning of section 4553.

Next, we consider the WCJ's conclusion that the injury was not proximately caused by the removal of the guard. It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Further, decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set [] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]).)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.*

(2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

Here, it is unclear from the Opinion on Decision how the WCJ determined that the removal of the guard was not a proximate cause of applicant's injury. As far as we can glean from our review of the record, there is simply no evidence on this point one way or the other, as all the testimony related to the guard seemed to focus on when, how and why it had been removed, not on the practical significance of the removal as it related to applicant's ultimate injury. The fact that applicant's use of gloves was a proximate cause of his injury does not mean that the removal of the guard could not also have been a proximate cause of the injury, and without any evidence one way or the other, we do not think the WCJ's statement that the removal of the guard was not a proximate cause can be upheld. Instead, assuming such evidence is not present in the record, we believe it was incumbent on the WCJ to develop the record on that issue, as the course of conduct of the parties clearly indicates that the issue of the removal of the guard was considered an important issue in the case by both parties.

To summarize, we believe that Ortega was a managing representative, and that more development of the record may be required on the question of whether the removal of the guard was a proximate cause of applicant's injury. If the removal of the guard was a proximate cause of applicant's injury, it appears that the requirements of section 4553.1 would be met, because the testimony amply established that Ortega removed the guard despite knowing that doing so violated a Cal/OSHA safety order. Similarly, although the WCJ found that the violation of safety order related to the use of gloves was a proximate cause of applicant's injury, the WCJ did not fully analyze liability under section 4553.1 on that basis because of the erroneous conclusion that Ortega was not a managing representative.

Accordingly, we believe the best course of action here is to rescind the F&O, substitute a new order finding that Ortega was a managing representative, and return the matter to the WCJ for further development of the record as necessary on the question of whether the removal of the guard was a proximate cause of applicant's injury, and for the subsequent issuance of a new F&O that analyzes liability for the apparent violations of both safety orders in light of the finding that Ortega was a managing representative.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 20, 2022 Findings of Fact is **RESCINDED** and the following order **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Carlos Reyes, while employed on March 29, 2012, as a carpenter, at Palm Desert, California, sustained an injury arising out of and in the course of employment to his left index, middle, and ring fingers, as well as psyche.
2. Victor Ortega was a managing representative of Palm Desert Doors and Hardware under the meaning of Labor Code section 4553.
3. All other issues are deferred.

ORDER

IT IS HEREBY ORDERED that the matter is returned to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 30, 2024

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

CARLOS REYES
CHRISTOPHER CONGLETON
WINET, PATRICK, GAYER, CREIGHTON & HANES

AW/*pm*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. o.o