WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

FRANCISCO LOPEZ ROMERO, ***Applicant***

vs.

PIERRE LANDSCAPE; ZURICH AMERICAN INSURANCE, ***Defendants***

Adjudication Number: ADJ11739682
Anaheim District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the February 28, 2022 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a landscaper on November 6, 2018, sustained industrial injury to his chest, back, left elbow, left wrist, left shoulder, and neck. The WCJ found that there was no negligence on the part of the employer and granted defendant credit in the net amount of applicant's recovery from a civil lawsuit arising out of the industrial injury.

Applicant contends that the F&O is not based on substantial evidence and that there is some degree of employer negligence.

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

We have considered the Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons set forth in the WCJ's Report, which we adopt

[1] Commissioner Lowe, who was previously a member of this panel when it granted reconsideration to study the legal and factual issues presented, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

and incorporate as the decision of the Workers' Compensation Appeals Board (WCAB), and for the reasons discussed below, we will affirm the F&O.

Applicant sustained injury to his chest, back, left elbow, left wrist, left shoulder, and neck while employed as a landscaper by defendant Pierre Landscape on November 6, 2018.

The WCJ's Report describes the factual background as follows:

> Applicant was employed by Pierre Landscape, Inc. as a landscaper. Applicant resided in Baldwin Park and would drive to work near Indio. He was provided a company vehicle and would pick up co-workers on his way to work. On 11/6/18, Applicant was on his way to work with a coworker, Edgar Guzman. They were on the I-10 Freeway near the Fairplex Street Exit in Pomona, when the Applicant and passenger were involved in an automobile accident. MOH/SOE dated 1/26/22, pg. 2, lines 10-18.
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> According to the police report, the Applicant was driving at an unsafe speed and failed to observe a vehicle stopped in his lane. Applicant struck the vehicle and a person standing near the vehicle. As a result of the impact the individual who was struck was "propelled across the center divider wall and into the westbound lanes of I-10." The individual sustained fatal injuries. Joint Exhibit X.
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> The applicant brought a civil claim against the decedent's insurance and received a net recovery of $66,081.67. Amended Petition for Third Party Credit, EAMS Doc ID 35465120. Defendant filed a Petition for Third Party Credit on 2/5/21. An Order Allowing Credit was issued on 2/17/21 by Judge Howard Lemberg. Applicant filed an Objection to the Order on 3/10/21 stating the Board did not determine the degree of fault to the employer and requested additional time to conduct discovery. Objection to Order Allowing Credit, EAMS Doc ID 35860178. Shortly thereafter, Applicant filed a Petition for Reconsideration/Removal. On 3/15/21, Judge Lemberg rescinded the Order Allowing Credit and set the matter for a hearing.
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> (Report, at p. 2.)

On October 6, 2021, the parties proceeded to trial and framed for decision the sole issue of "[w]hether Defendant is entitled to a third-party credit, based upon the Petition for Credit filed by Defendant." (Minutes of Hearing, dated October 6, 2021, at p. 2:14.) The WCJ admitted documentary evidence into the record and continued the matter.

On January 26, 2022, the WCJ conducted additional trial proceedings and heard testimony from applicant. The WCJ ordered the matter submitted the same day. (Minutes of Hearing and Summary of Evidence, dated January 26, 2022, at p. 1:24.)

On February 28, 2022, the WCJ issued her F&O, determining that with respect to the industrial injury, there was no negligence on the part of the employer. (Finding of Fact No. 2.) The WCJ therefore granted defendant's Petition for Credit in the full amount of applicant's net recovery from his civil lawsuit, $66,081.67. The Opinion on Decision explained that "[a]pplicant did not provide any evidence that the employer had any knowledge of a dangerous condition in the workplace." (Opinion on Decision, at p. 2.)

Applicant's Petition contends applicant and his employer were parties to a "special relationship," that the employer was aware that applicant's co-worker Mr. Guzman was causing applicant to be late for work, and that the "special relationship of employer and employee should have taken corrective action to get Guzmán to stop this, or to transfer him away from the Applicant including having him take public transportation, all of which would have allowed the Applicant to arrive to work on time and to avoid the accident." (Petition, at p. 4:8.) In the alternative, applicant contends that the WCAB must develop the evidentiary record. (*Id.* at p. 11:11.)

Defendant's Answer responds that applicant failed to meet his burden of proof on the issue of employer negligence. Defendant asserts that "the only evidence applicant presented at trial on this issue was a mere claim that the employer was somehow to blame for the applicant's unsafe driving because the employer expected its employees to arrive to work on time," and that employer was not responsible for applicant's "deliberate choice to drive at an unsafe speed which was the proximate cause of the accident." (Answer, at p. 7:1.)

The WCJ's Report observes that an employer cannot be held to be negligent in the absence of evidence establishing that it knew or should have known of a dangerous condition. (Report, at p. 4.) The WCJ notes that there is "there is no evidence to show the employer knew or should have known that there would be a disabled vehicle in the middle of lane which Applicant was driving in and the Applicant would strike the vehicle." (*Id.* at p. 5.) Further, "[t]he employer could not reasonably foresee every accident, and/or prevent every accident that could occur while on the way to work." (*Ibid*.) Accordingly, the WCJ recommends we deny applicant's Petition.

In *Martinez v. Associated Engineering & Constr. Co.* (1979) 44 Cal.Comp.Cases 1012, [1979 Cal. Wrk. Comp. LEXIS 2756] (Appeals Board en banc), we held that the evaluation of a defendant's claim of credit rights required the following analysis:

> First, defendant has the burden of proof to establish its right to claim a credit. It must show that there was a third party settlement and that it has paid out

> compensation benefits or will likely have to pay such benefits in the future. This can be done by production of certified copies of the Superior Court documents reflecting a settlement or judgment. Normally however, as in this case, copies of the documents or a stipulation as to applicant's net recovery will suffice.
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> …
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> Second, once a prima facie case has been made to show entitlement to credit, applicant has the burden of proof to establish the employer was negligent in any degree. If there is no employer negligence, the carrier is entitled to full credit. In this case, applicant not only established employer negligence, but 100% employer negligence.
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> Third, the burden of going forward shifts to the employer or carrier to show comparative negligence of the third party defendant or defendants and any negligence by applicant. In this case, defendant offered no evidence and the deposition testimony, as we will explain below, does not aid defendant.
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> Fourth, the burden then shifts to applicant to establish his total damages, i.e., that figure to which the employer's negligence is applied after deducting applicant's proportionate share of comparative negligence, to determine credit in accordance with the formula in [*Associated Construction and Engineering Co. v. WCAB (Cole)* (1978) 22 Cal.3d 829 [43 Cal.Comp.Cases 1333]]. In this case, it was unnecessary for applicant to prove, or the workers' compensation judge to determine, applicant's actual damages in view of the finding on employer negligence. Thus, where the evidence establishes 100% employer negligence, or overwhelming employer negligence, or even a high degree of employer negligence, it would be necessary to take only enough evidence to establish that compensation benefits could not possibly exceed the employer's share of the damages. It is not necessary for us to determine in this case the extent of the inquiry into overall damages.
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> (*Id*. at 1021-1022.)

Here, defendant's Amended Petition for Credit attaches evidence of the gross third-party settlement arising out of the November 6, 2018 motor vehicle accident, as well as applicant's net proceeds from the settlement. (Amended Petition for Credit, dated February 5, 2021, Exhs. A & B.) Defendant has further stipulated to injury to the chest, back, left elbow, left wrist, left shoulder and neck, arising out of the injury of November 6, 2018. Defendant has thus made a prima facie showing of entitlement to credit.

The burden now shifts to applicant to establish that the employer was negligent in any degree. The WCJ's Opinion observed:

> Applicant did not provide any evidence that the employer had any knowledge of a dangerous condition in the workplace. Applicant testified he was using the company car and was instructed by the company to pick up his co-workers. **MOH/SOE dated 1/26/22 pg. 3 lines 22-23**. However, there was no evidence provided that the company car the Applicant was using caused the accident or the car was dangerous in anyway. In fact, the Applicant was cited for speeding and testified he would not be surprised if his speeding caused the accident. **Ibid line 1 and lines 11-12.**
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> (Opinion on Decision, at p. 2.)

Applicant's Petition concedes that applicant was at fault, but "not completely and exclusively at fault." (Petition, at p. 9:7.) Applicant asserts that "it was a foreseeable harm that an accident would occur if the employer in this special relationship with the employee, the Applicant, did not implement remedial measures to prevent Mr. Guzmán from being late and causing or contributing to the Applicant's need to speed beyond the legal speed limit in order to be punctual and avoid getting fired, most especially if his warning is disregarded and met with a threat of termination." (*Id.* at p. 10:17.)

The WCJ's Report observes, however, that applicant offered no evidence to show the employer "knew or should have known that there would be a disabled vehicle in the middle of the lane which Applicant was driving in, the employer could not reasonably foresee every accident, and/or prevent every accident that could occur while on the way to work on a busy interstate highway." (Report, at p. 5.) With respect to the issue of whether applicant's coworker's frequent tardiness contributed to the accident, the WCJ's Report observes:

> If Applicant was concerned about being late to work and/or being terminated, the Applicant could have left on time from his home instead of waiting for Mr. Guzman. Additionally, the Applicant has been a licensed driver in California since 1995 and had a good record; it is presumed the Applicant knew that driving over the speed limit was against the law and dangerous. The employer didn't force the Applicant to break the law. Based upon the evidence as presented, Applicant's injury was unfortunate, but not foreseeable or preventable so as to reduce defendant's statutory right to credit.
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> (Report, at p. 5.)

We agree. We observe that insofar as applicant asserts defendant was negligent in failing to appreciate the risk that applicant might exceed the speed limit due to a co-worker's chronic tardiness, the Traffic Collision Report prepared by the California Highway Patrol sets forth a

contemporaneous statement by applicant that his rate of travel on Interstate 10 was approximately 65-70 miles per hour at the time of the collision. (Ex. X, Traffic Collision Report, dated May 6, 2019, at p. 27.) The statement from applicant's coworker, Mr. Guzman Murguia, was that applicant "was not driving fast." (*Ibid*.) Thus, the record offers conflicting information as to whether applicant was driving in excess of the posted speed limit.

Irrespective of the above, we note that "foreseeability of the risk is a primary consideration in establishing the element of duty." (*Vandermost v. Alpha Beta Co.* (1985) 164 Cal.App.3d 771, 776 [210 Cal. Rptr. 613]). As is discussed in the WCJ's Report, the record offers no persuasive argument that defendant should have foreseen the series of events that resulted in applicant's injuries on November 6, 2018, including traffic conditions on an interstate highway outside of the employer's control, or a disabled vehicle in traffic lanes. (Report, at p. 5.) Nor does the record establish any actions taken by the employer directing applicant to exceed the speed limit or to conduct his vehicle in an unsafe fashion.

In the absence of a persuasive argument for the foreseeability of the accident, and in the absence of any evidence establishing the employer directed applicant to act in a way that was dangerous to himself or to others, we agree with the WCJ's conclusion that defendant did not abrogate a duty of care. We affirm the WCJ's finding of no employer negligence, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 28, 2022 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 28, 2024

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

FRANCISCO LOPEZ ROMERO
PEREZ LAW
BRADFORD & BARTHEL

SAR/abs

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

REPORT AND RECOMMENDATION BY WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

Applicant sustained an injury arising out of and occurring in the course of employment to the chest, back, left elbow, left wrist, left shoulder and neck. On 2/28/22, the court issued a Findings and Order finding no negligence on the part of the employer and granting defendant credit in the amount of $66,081.67. The applicant, by and through his attorney of record, filed a timely, verified Petition for Reconsideration pursuant to *Labor Code* §5903. Petitioner contends the Findings and Order are not based on substantial evidence, there was some degree of employer negligence, and the court must develop the record. At the time of this report, defendant had not filed an Answer to the Petition for Reconsideration.

II.

FACTS

Applicant was employed by Pierre Landscape, Inc. as a landscaper. Applicant resided in Baldwin Park and would drive to work near Indio. He was provided a company vehicle and would pick up co-workers on his way to work. On 11/6/18, Applicant was on his way to work with a coworker, Edgar Guzman. They were on the I-10 Freeway near the Fairplex Street Exit in Pomona, when the Applicant and passenger were involved in an automobile accident. MOH/SOE dated 1/26/22, pg. 2, lines 10-18.

According to the police report, the Applicant was driving at an unsafe speed and failed to observe a vehicle stopped in his lane. Applicant struck the vehicle and a person standing near the vehicle. As a result of the impact the individual who was struck was "propelled across the center divider wall and into the westbound lanes of I-10." The individual sustained fatal injuries. Joint Exhibit X.

The applicant brought a civil claim against the decedent's insurance and received a net recovery of $66,081.67. Amended Petition for Third Party Credit, EAMS Doc ID 35465120. Defendant filed a Petition for Third Party Credit on 2/5/21. An Order Allowing Credit was issued

on 2/17/21 by Judge Howard Lemberg. Applicant filed an Objection to the Order on 3/10/21 stating the Board did not determine the degree of fault to the employer and requested additional time to conduct discovery. Objection to Order Allowing Credit, EAMS Doc ID 35860178. Shortly thereafter, Applicant filed a Petition for Reconsideration/Removal. On 3/15/21, Judge Lemberg rescinded the Order Allowing Credit and set the matter for a hearing.

A status conference was held on 4/5/21 at which time parties continued the matter to a Mandatory Settlement Conference because the matter was to be set for trial on the issues of third party credit and employer negligence. No objection was made by either party to continue the matter to an MSC. Minutes of Hearing 4/5/21, EAMS Doc ID 74065314. The MSC was held on 6/7/21 at which time parties were unable to prepare the Pre-Trial Conference Statement hence Judge Lemberg took the matter off calendar. Minutes of Hearing 6/7/21, EAMS Doc ID 74299027.

On 7/1/21, Defendant filed a Declaration of Readiness in order to set the matter for a Mandatory Settlement Conference on the issue of the Petition for Credit. No objection was filed by the Applicant. On 8/9/21 parties appeared at the Mandatory Settlement Conference before Judge Lemberg and set the matter for trial with no objections by either party. Minutes of Hearing 8/9/21, EAMS Doc ID 74529188. Parties appeared before the undersigned judge on 10/6/21 and began trial, however, due to the witness's inability to testify that day and the court's unavailability in the afternoon, the matter was continued for testimony; no objections were made by either party. MOH/SOE dated 10/6/21. On 1/26/22, Applicant testified at trial and parties submitted the matter. Once again, no objections were stated.

After considering Applicant's testimony and reviewing the only exhibit submitted by the parties, the court found no negligence on the part of the employer and awarded defendant credit in the total amount requested. It is from these Findings and Order that Applicant Petitions for Reconsideration under *Labor Code* §5903.

III.
DISCUSSION

As to Applicant's assertion that the Findings and Order are not based on substantial evidence and impermissibly isolate evidence to maintain its incorrect findings and order and do not review the record as a whole, the court offers the following:

Applicant alleges the court did not consider the facts on the issue of employer negligence and that there was a special relationship between the employer and the Applicant. The Applicant, relying on this relationship, asserts his co-worker's tardiness caused the accident because the employer failed to do anything about Applicant's complaints of his co-worker's tardiness. Due to that failure, Applicant asserts the employer has comparative fault and negligence in this matter. The court reviewed the entire record presented and it did not find comparative fault and negligence on the part of the employer. In his petition, Applicant states he was at fault, but not completely at fault. However, Applicant did not provide evidence showing any comparative fault and negligence on the part of employer with regard to the accident that occurred. Applicant did in fact testify "If he had not been speeding, the accident would not have happened." MOH/SOE dated 1/26/22, pg. 3 lines 23-24.

As to Applicant's assertion there is some degree of employer negligence, the court offers the following:

Applicant argues there is a special relationship between the Applicant and the employer. This alleged special relationship is said to arise from some control the employer has over the employee. In this matter, Applicant alleges the employer should have foreseen the accident and because the employer did not reprimand Applicant's co-worker for his tardiness, the employer is negligent.

In *Perez-Zepeda v. WCAB* (2015) (writ denied) 80 CCC 1217, a janitor provided janitorial services at a building owned by a third party. The building was decommissioned and the janitor fell nine feet while moving furniture after a guardrail was removed. The court found that the employer could not be found negligent as there was no evidence that the employer knew or should have known of the dangerous condition involving the guardrail.

> "[T]he employer's statutory duty to maintain a safe workplace cannot be delegated to a third party so as to effectively insulate the employer from liability. Where the employer *has knowledge of a dangerous condition* in the workplace caused by the negligence of a third party, *or reasonably should have discovered it*, and fails to take reasonable steps either to alleviate the danger or to give an adequate warning in order to prevent injury to employees, the employer, for purposes of the credit determinations, must, as a matter of law, be found concurrently negligent at a degree greater than a de minimis amount. (*Bonner, 55 Cal. Comp. Cases at 570-471.* Emphasis added [*by WCAB*]."

Here, there is no evidence to show the employer knew or should have known that there would be a disabled vehicle in the middle of lane which Applicant was driving in and the Applicant would strike the vehicle. There was no evidence that the vehicle Applicant was driving had anything wrong with it, or that there were safety concerns with the vehicle. Furthermore, the accident did not occur in the workplace but on the way to work, on a very busy Interstate. The employer could not reasonably foresee every accident, and/or prevent every accident that could occur while on the way to work.

Applicant argues the employer should have known that due to the Mr. Guzman's tardiness, Applicant would be involved in an accident. According to Applicant's own testimony, one of the ladies he spoke with indicated they would talk to Mr. Guzman and if he continued to be late, they would fire him. MOH/SOE dated 1/26/22, pg. 3, lines 6-8. If Applicant was concerned about being late to work and/or being terminated, the Applicant could have left on time from his home instead of waiting for Mr. Guzman. Additionally, the Applicant has been a licensed driver in California since 1995 and had a good record; it is presumed the Applicant knew that driving over the speed limit was against the law and dangerous. The employer didn't force the Applicant to break the law. Based upon the evidence as presented, Applicant's injury was unfortunate, but not foreseeable or preventable so as to reduce defendant's statutory right to credit.

As to Applicant's assertion the board must develop the record, the court offers the following:

The matter was set based on Defendant's Declaration of Readiness to which Applicant did not object to. At the Mandatory Settlement Conference on 8/9/21, the parties set the matter for trial with no objections. At no time did Applicant suggest additional discovery was needed. The trial spanned 3 separate dates and at no time did Applicant make a motion to go off calendar for further

discovery. Applicant testified on the final day of trial and the parties submitted on the matter with no objections. The court finds Applicant's request to further develop the record to be disingenuous after receiving the court's decision. Because the court found no evidence of employer negligence, the record does not need to be further developed.

IV.
RECOMMENDATION

Based upon the above, it is the undersigned's recommendation that Applicant's Petition for Reconsideration be denied and the WCAB uphold and affirm the Findings and Order of the undersigned judge dated 2/28/22.

DATE: March 30, 2022

Katharine Holmes
WORKERS' COMPENSATION JUDGE