WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GIOVANNIE DANKWAH, *Applicant*

vs.

CITY OF LOS ANGELES, *Defendant*

Adjudication Number: ADJ16800773
San Francisco District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration. We have considered the allegations of the Petition for Reconsideration and the contents of the Report and Recommendation on Reconsideration of the Arbitrator with respect thereto. Based on our review of the record, and for the reasons stated in the Arbitrator's Report, which we adopt and incorporate, we will deny reconsideration.

Preliminarily, we note that Labor Code[2] section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493]; see *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635 fn. 22 [70 Cal.Comp.Cases 312] ["irregularity which deprives reconsideration under the statutory scheme denies due process"].) In *Shipley,* applicant sought a writ of review of a decision of the Appeals Board denying his petition for reconsideration by operation of law (Lab. Code, § 5909). The Court there granted a writ of review, stating that

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[1] Commissioner Sweeney, who previously served on the panel which granted reconsideration to further study the factual and legal issues in this case, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

[2] All further statutory references are to the Labor Code, unless otherwise noted.

while the "language [section 5909] appears mandatory and jurisdictional, the time periods must be based on a presumption that a claimant's file will be available to the board; *any other result deprives a claimant of due process and the right to a review by the board*." (*Shipley, supra,* 7 Cal.App.4th at pp. 1107-1108, italics added.)

In *Shipley,* the Court of Appeal reversed the Appeals Board, holding that the time to act on the petition was tolled during the period the file was misplaced and unavailable to the Appeals Board. (*Shipley, supra,* 7 Cal.App.4th at p. 1007.) The Court emphasized that "Shipley's file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control." (*Shipley, supra,* 7 Cal.App.4th at p. 1007.) "Shipley's right to reconsideration by the board is likewise statutorily provided and *cannot be denied him without due process*. Any other result offends not only elementary due process principles but common sensibilities. Shipley is entitled to the board's review of his petition and its decision on its merits." (*Id.*, at p. 1108, italics added.) The Court stated that its finding was also compelled by the fundamental principle that the Appeals Board "accomplish substantial justice in all cases..." (Cal. Const., art. XIV, § 4), and the policies enunciated by section 3202 "to construe the act liberally 'with the purpose of extending their benefits for the protection of person injured in the course of their employment.'" (*Id*., at p. 1107.) The Court in *Shipley* properly recognized that in workers' compensation, deprivation of reconsideration without due process – without this full de novo review of the record in the case – "offends" the fundamental right of due process, as well as the Appeals Board's mandate to "accomplish substantial justice in all cases..." (*Shipley, supra,* 7 Cal.App.4th at p. 1107-1108.)

We note that all timely petitions for reconsideration filed *and received* by the Appeals Board are "acted upon within 60 days from the date of filing" pursuant to section 5909, by either denying or granting the petition.[3] The exception to this rule are those petitions *not received* by the Appeals Board within 60 days due to irregularities outside the petitioner's control. (See *Rea, supra,* 127 Cal.App.4th at p. 635, fn. 22.) Pursuant to the holding in *Shipley* allowing tolling of the 60-day time-period in section 5909, the Appeals Board acts to grant or deny such petitions for

[3] The Appeals Board does not deny petitions for reconsideration by operation of law pursuant to section 5909 based on the Supreme Court's holdings that summary denial of reconsideration is no longer sufficient after the enactment of section 5908.5. (*Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350], *Le Vesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 ["We hold that if the appeals board denies a petition for reconsideration its order may incorporate and include within it the report of the referee, provided that the referee's report states the evidence relied upon and specifies in detail the reasons for the decision." (See Lab. Code, § 5908.5.)"]; *Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 893.)

reconsideration within 60 days of receipt of any such petition, and thereafter to issue a decision on the merits. By doing so, the Appeals Board also preserves the parties' ability to seek meaningful appellate review. (Lab. Code, §§ 5901, 5950, 5952; see *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].) This approach is consistent with *Rea* and other California appellate courts,[4] which have consistently followed *Shipley's* lead when weighing the statutory mandate of 60 days against the parties' constitutional due process right to a true and complete judicial review by the Appeals Board.[5]

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[4] See e.g., *Hubbard v. Workers Compensation Appeals Bd. of California* (1993) 58 Cal.Comp.Cases 739 [writ of review granted to annul Appeals Board's denial of petition for reconsideration by operation of law (Lab. Code, § 5909)]; see also, *Frontline Medical Associates, Inc. v. Workers' Comp. Appeals Bd. (Lopez, Leonel; Sablan, Yolanda)* (2022) 87 Cal.Comp.Cases 314 (writ den.); *Entertainment by J & J, Inc. v. Workers' Comp. Appeals Bd. (Bernstein)* (2017) 82 Cal.Comp.Cases 384 (writ den.); *Bailey v. Workers Compensation Appeals Bd. of California* (1994) 59 Cal.Comp.Cases 350 (writ den.). Recent denials in all District Courts of Appeal include: First District, Div. 1 (*Scaffold Solutions v. Workers' Compensation Appeals Board and Angelo Paredes* (2023) (A166655)); First District, Div. 4 (*Kaiser Foundation Health Plan v. Workers' Compensation Appeals Board and Julie Santucci* (2021) (A163107)); Second District, Div. 3 (*Farhed Hafezi and Fred F. Hafezi, M.D., Inc. v. Workers' Comp. Appeals Bd.* (2020) (B300261)(SAU8706806)); Third District (*Reach Air Medical Services, LLC et al. v.Workers' Compensation Appeals Board. et al. (Lomeli)* (2022) (C095051)); Third District (*Ace American Insurance Company v. Workers' Compensation Appeals Board and David Valdez* (C094627) (2021)); Fourth District, Div. 2 (*Carlos Piro v. Workers' Compensation Appeals Board and County of San Bernardino* (2021) 86 Cal.Comp.Cases 599); Fourth District, Div. 3 (*Patricia Lazcano v. Workers' Comp. Appeals Bd*. (2022) 88 Cal.Comp.Cases 54); Fifth District (*Great Divide Insurance Company v. Workers' Comp. Appeals Bd., et al. (MelendezBanegas)* (2021) 86 Cal.Comp.Cases 1046); Sixth District (*Rebar International, Inc., et al. v. Workers' Comp. Appeals Board et al. (Haynes*) (2022) 87 Cal.Comp.Cases 905).

[5] The holding in *Zurich American Ins. Co. v. Workers' Comp. Appeals Bd.* (2023) 97 Cal.App.5th 1213 (*Zurich*) is not inconsistent with *Shipley* and other California Appellate Court precedent concurring and/or affirming the finding in *Shipley* that equitable considerations may exist to toll the 60-day time limit of section 5909. Indeed, the *Zurich* Court expressly declined to "resolve" the question of whether section 5909 was intended to be "mandatory and jurisdictional." (*Zurich, supra,* 97 Cal.App.5th at p. 1236, fn. 17.) Under *Zurich*, as in *Shipley*, "equitable considerations" may provide grounds to excuse an action by the Appeals Board outside the 60 days provided for in section 5909. (*Zurich, supra,* 97 Cal.App.5th at p. 1238.) The *Zurich* Court found that the Appeals Board acted "in excess of its jurisdiction," *and* that there were no equitable considerations sufficient enough to toll the time limit in section 5909 beyond 60 days. (*Id.* at p. 1239.)

We note that the *Zurich* Court failed to consider that Labor Code section 5803 provides for continuing jurisdiction by the Appeals Board over all of its "orders, decisions, and awards," and that section 5301 provides for "full power, authority and jurisdiction" by the Appeals Board for all proceedings under section 5300. Additionally, jurisdiction is conferred on the Appeals Board when a petition is timely filed under Labor Code section 5900(a), and the Appeals Board may review the entire record, even with respect to issues not raised in the petition for reconsideration before it. A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

In this case, the arbitrator issued the Findings and Award on March 23, 2021 and applicant filed a timely Petition for Reconsideration on April 12, 2021. Thereafter, the Appeals Board failed to act on applicant's petition within 60 days of its filing, through no fault of petitioner. Accordingly, considering that the Appeals Board's failure to act on the petition was in error, we find that our time to act was equitably tolled.

We have given the Arbitrator's credibility determinations great weight because the Arbitrator had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the Arbitrator's credibility determinations. (*Id*.)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 23, 2021 Arbitrator's Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 24, 2024

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

GIOVANNIE DANKWAH
THE BRIDGEFORD LAW OFFICE
CITY ATTORNEY OF LOS ANGELES
MARK L. KAHN, ARBITRATOR

PAG/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 ON RECONSIDERATION

I.

INTRODUCTION

The above-captioned matter was set for Arbitration before Mark L. Kahn, Arbitrator, on the issues of injury arising out of and occurring in the course of employment and initial physical aggressor on February 3, 2021. The parties reached Stipulations, Issues, admitted Exhibits into evidence and testimony was taken and the parties agreed to submit the matter on the present record.

On March 22, 2021 the Arbitrator, issued a Finding and Order as follows:

The Arbitrator found, based upon review of all the evidence, that the applicant threw the first punch and there is no substantial factual evidence to support the applicant's claim that the conduct of the driver (Williams) could be reasonably perceived as presenting a real, present and apparent threat of bodily harm, making the applicant the initial physical aggressor.

The Arbitrator found the applicant was the initial physical aggressor and applicant's claim was barred by Labor Code §3600(a)(7).

The Arbitrator found the applicant did not sustain an injury arising out of and occurring the course of his employment because the applicant was found to be the initial physical aggressor.

It was Ordered the applicant take nothing from his claim.

It is from this Findings and Order that applicant now seeks reconsideration on the following founds:

Although the applicant admitted he threw the first punch, he argues he was not the initial physical aggressor because the conduct of the driver (Williams) could be reasonably perceived as presenting a real, present and apparent threat of bodily harm, making the driver the initial physical aggressor.

The video of the incident supports the applicant's claim he was not he initial physical aggressor because the conduct of the driver (Williams) should be reasonably perceived as presenting a real, present and apparent threat of bodily harm, making the driver the initial physical aggressor.

The Arbitrator decided the case on the facts and analysis set forth below and the testimony of the other party, the dispute of Williams, whose testimony was found credible, the lack of credibility of the applicant, reviewing the films of the incident, the testimony of the police officer called to the scene, and the testimony of the claims administrator for the City of Los Angeles.

The Arbitrator found that the applicant threw the first punch and there was no substantial factual evidence to support the applicant's claim that the conduct of the driver could be reasonably perceived as presenting a real, present and apparent threat of bodily harm, making the driver the initial physical aggressor.

II

DISCUSSION

A.

The applicant admits he threw the first punch.

However, the applicant argues he was not the initial physical aggressor because the applicant claimed the conduct of Williams, the driver of the vehicle he approached over a parking violation, should be reasonably perceived as presenting a real, present and apparent threat of bodily harm, making the driver the initial physical aggressor.

Therefore, the driver (Williams) was the initial physical aggressor and that the applicant was not the initial physical aggressor.

Labor Code §(a) provides that liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706 and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur: (a)(7) provides where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.

A person can be the initial physical aggressor even if they strike the first blow.

According to the testimony of the applicant, the video of the incident and the police report, the applicant struck the first blow in this case.

However, according to the case of *Mathews v. WCAB* (1972) (37 CCC 124, 128) an employee may not be the initial physical aggressor when first causing physical harm to the other person as long as the employee engages in conduct a reasonable person would perceive to be a real, present and apparent threat of bodily harm.

An employee may not be deemed to be the initial physical aggressor even if he or she first causes physical harm, when the conduct was reasonably perceived as presenting a real, present and apparent threat of bodily harm. (*Newark Unified School District v. WCAB* (*Rodriguez*) (1996) 61 CCC 1078 (writ denied).

The applicant claims in this case the facts support he is not the initial physical aggressor because the applicant had reasonable personal belief that he perceived, based on the conduct of Earvin Williams that the applicant was presented with a real, present and apparent threat of bodily harm and threw the first punch based on the perception.

The applicant claims that on that day, he saw a vehicle double-parked.

He signaled the driver to move the car.

The driver (Williams) then said, "Nigger, you better move because I am going to shoot you in the face."

The applicant then went behind the car in order to issue a violation by taking a picture of the car to show the license plate. The camera did not work.

The applicant then walked 300 feet north because there was alfresco dining and usually there are many people around that area and he felt that would be safer.

The applicant then heard somebody using language, "Nigger, you better back off because I am going to shoot you."

He heard him first and then turned around and saw an individual who looked like the person that was the driver of the vehicle coming toward him.

He would describe Williams' demeanor as very aggressive. He had his hand clinched in a fighting manner and one hand in his pocket.

As Williams got closer, he said "I am going to shoot, Nigger: I am going to shoot. Today is going to be my day."

The driver (Williams) was just coming toward him and the driver spit on him. He started to backup.

He believed the driver was going to hurt him. He felt intimidated as the driver was approaching him. He believed the driver had something in his pocket because of the statement he made that he was going to shoot him. He knew he was basically dead and the driver wanted to kill him. He believed he had a gun in his pocket. He felt he had something in his hand and he was going to stab him with it. He felt the driver wanted to cause him damage and harm. He felt he had to take a stand.

He believes he then swung first.

Officer Cifuentes Borrayes testified that he responded to call of a battery investigation on August 29, 2020 involving the applicant.

He spoke to the applicant and asked him how the incident occurred. The applicant stated he was walking northbound on Monument Street on the sidewalk, he observed a vehicle double parked and he asked the vehicle to move. The citizen did not move his vehicle, so the applicant went behind the vehicle to take a picture of the license plate. He did not get a photo, according to the applicant, so we kept walking northbound on Monument.

The driver then exited the car and that is when he called to him, "hey, hey, why did you cite me?", and then a fight broke.

According to the applicant, the citizen punched him first.

The officer was able to recover a surveillance video from a nearby business. After viewing the video, it did not show that the citizen punched the applicant first.

The video showed contradicting points from what the applicant told him.

The video showed that the officer in fact punched the citizen first.

The applicant mentioned he was kicked in the groin. The video contradicted what the applicant told him as the video did show the applicant being kicked in the groin area.

He took the report from the citizen. The report from the citizen was a little different. The citizen told him that he was punched first by the applicant and at no time did he kick the applicant in the groin area.

Earvin Williams testified that on August 29, 2020, he was going out to get some food with his girlfriend. He was looking for a parking place. He had already seen parking enforcement going around. They were going to park in the red zone for a short time and pick up the food.

However, they did not want to get a ticket so they pulled up at the stop sign and they were looking for somewhere to park. As they were stopped at the stop sign, they saw the traffic officer come up to the car and he said, "hey, you guys can't be right here."

He then saw the officer go behind his car and pull out his machine that gives out tickets to take pictures of the car. He was behind his car using the machine.

He parked the car and he got out of the car and ran down to ask the applicant if he gave him a ticket. He also told the officer they were not parking and were moving.

When the applicant told him to move the car, he did not make any verbal response, he just started moving the car. He did say, yes we are moving. He did not say, at any time, he was going to shoot the applicant in the face. He does not own a firearm.

He got out of the car and ran towards the applicant. He was trying to get there as fast as he could before the applicant started processing the ticket. He yelled out to the applicant that he did not stop there. He does not recall having his fists clenched as he ran toward the applicant. When asked if his hands were in his pocket or one of his hands he said, he does not recall, he would say no.

As soon as he pulled up next to the applicant, the applicant asked him what are you doing and then he felt a blow to the face. The applicant hit him. He was hit four to six times. The applicant continuously struck him. He hit him with his hand and he hit him with his radio multiple times in the head. He had multiple bruises on his head. He does not recall hitting the applicant. He was defending himself. Once the applicant hit him, he was just defending himself. The applicant hit him first.

He did not spit on the applicant. He believes he was struck while on the ground.

The police were called to the scene and they took his statement. No one was arrested. He went to the hospital.

When asked if at any time did he give any impression or any words that he was going to kill the applicant, he testified no not at all. It was strictly about the ticket. He never mentioned anything about a gun or shooting the applicant.

Gail Magallanes testified that she works for the City of Los Angeles as a claims analyst. She spoke to the applicant in this case. The applicant called her and she informed him they had denied his case. She explained to him the evidence they had was that he was the initial aggressor and for workers' compensation and if you are the initial aggressor, you are not entitled to benefits. This was in connection with the incident on August 29, 2020.

The first time she spoke to the applicant was during her three-point contact which was on the Tuesday after the incident, which was September 1. She spoke to him for 10 to 20 minutes. They went over the incident.

She was told by the applicant he was doing his duties when he came upon a car that was double-parked outside a restaurant. He asked the driver to move the vehicle because he was impeding traffic and the driver said several things to him including I am going to beat you down

and I am going to kill you. When the car did not move, the traffic officer went behind the vehicle to take a picture of the license plate and the picture did not come out well. At that time, the traffic officer said the driver was still yelling things from the car so he decided to move on down the street.

The Applicant told her that he was walking down the street because he was looking at other vehicles for citations when he heard someone yelling, “hey did you cite me?”

When he turned around, he saw someone rushing to him who looked like the driver of the vehicle he asked to move in front of the restaurant. The citizen was yelling at him asking him “why did you cite me?” He also made rude comments about beating him down and killing him. He said he did not give him a ticket, however, if you want to continue this discussion, please put on your mask.

The citizen did not stop and the next thing he knew, he was hit by the citizen in the mouth and nose and then he returned the punches.

The applicant, on September 1, 2020, told her the citizen punched him first.

She watched the video. From a review of the video, it looked like the applicant swung first, not the citizen. The applicant did tell her that he was throwing the punches, but he could not recall how many. At some point, the citizen slipped and fell on top of the applicant. She did not notice the slip and fall in the film. Based on the film, the applicant threw the first punch.

When she did the three-point contact with the applicant, she took a history from the applicant. She asked him when he slipped. She asked him, when he slipped, did he hit his head. She asked if he lost consciousness at any time. He indicated no. The only thing he said was hurting was his right hand, mainly a couple of his finger.

The applicant never mentioned the word gun or shooting. During the three-point contact, he told her that he hurt his hand. She asked him if he ever hurt his hand before and he indicated no, not even a fracture, and he was a boxer three years ago. She does not recall him saying how long he boxed for, but he did mention that it was three years prior.

The surveillance video was reviewed, which showed Williams approaching the applicant. The video then appeared to show the applicant and the driver talking with each other. The applicant and the driver again appear to be talking and the driver, at first, backed up and then the applicant is backing up. It then appears that the applicant swings at the driver. The applicant hits the driver again. The applicant then swings and misses. The driver then swings for the first time and the applicant, hits the driver several more times, with the driver ending up on the ground and being hit several times. The applicant hits the driver with both hands and, in one hand, the applicant appears to hit him with the radio he is holding.

The applicant, according to his own testimony, first mentioned the gun when he came home and spoke to his wife.

The City of Los Angeles Inter-Departmental Memorandum filed on August 29, 2020 indicates the applicant started to walk away from the vehicle after not getting a good picture of the license plate. He walked about 300 feet when he heard someone shout, "I'm going to beat you down," looked over his shoulder and the first thing was a blow to his face between his nose and lip.

The Arbitrator found the testimony of Earvin Williams to be credible. The Arbitrator found Williams' testimony was supported by the police report, the video and other evidence.

The Arbitrator found Williams' testimony regarding who threw the first blow, not making threats to the applicant, not having a gun or knife, not spiting on the applicant, were credible based on observing his testimony and demeanor. The testimony being supported by the surveillance video, police report and testimony of the police officer and claims administrator and other evidence described above.

Based upon the above facts, the Arbitrator found the applicant threw the first punch.

The Arbitrator found the driver (Williams) did not spit on the applicant.

The Arbitrator found the driver did kick the applicant.

The Arbitrator found the driver did not threaten the applicant and only inquired whether the applicant was going to issue him a parking ticket.

The Arbitrator found the applicant's statement of the events lacks credibility.

The Arbitrator found, based upon review of all the evidence that there is no substantial evidence to support the applicant's claim that the conduct of the driver could be reasonably perceived as presenting a real, present and apparent threat of bodily harm to the applicant.

The Arbitrator found the applicant was the initial physical aggressor and applicant's claim is barred by Labor Code §3600(a)(7) and applicant did not sustain an injury arising out of and incurring the course of his employment because he was the initial physical aggressor.

The defense of applicant having a reasonably perceived expectation of a real and present danger and of apparent bodily harm depends on the facts of the case and the credibility of the applicant.

The applicant, in this case was found to lack credibility based on the fact there were many inconsistencies in his versions of what occurred in his testimony.

The applicant indicated that the driver (Williams) had a gun, yet there is no mention of the gun to the police at the scene or to the claims administrator.

The applicant does not mention the gun until much later.

The applicant indicated the driver may have had a knife. The applicant did not mention the knife in the police report. The applicant did not mention the knife to the police officer. The applicant did not mention the knife in reporting the injury to the employer.

The applicant also indicated to the police that the driver struck him first. When the police reviewed the surveillance video, the video showed the applicant threw the first punch.

He told the adjuster for the City of Los Angeles, after the incident occurred, the driver hit him first, which turned out to not be true.

The applicant describes threats from the driver, but in the police report, he only indicates the driver was confronting him whether he gave the driver a ticket.

Williams denied the threats.

Based on a review of the surveillance video, the police report, the testimony of the driver and the testimony of the police officer, the Arbitrator finds this is a case of a dispute over a traffic

ticket, the driver inquiring whether he got a ticket from the officer and, during the discussion, the officer hit the driver first.

There is no substantial evidence to support the applicant's claim of being under an imminent threat of physical harm other than the applicant's testimony, when he threw the first punch, he was in fear of a real, present and apparent threat of bodily harm.

For the reasons set forth above, the Arbitrator found the applicant's testimony lacking credibility because of the many misrepresentations he made to his employer and the police officer called to the scene of the incident.

B.

The applicant argues in his Petition for Reconsideration that the applicant's testimony was credible. The applicant argues that the driver of the vehicle the applicant encountered in the course of a possible parking violation, approached the applicant aggressively, with an aggressive demeanor and the applicant thought he had a weapon. The applicant then threw the first punch. The applicant argues he was not the initial physical aggressor because he threw the first punch in self-defense because he felt a real and present danger of imminent bodily harm.

As to the inconsistencies in applicant's testimony, the applicant argues that the incorrect and inconsistent statements, such as that Williams threw the first punch made to the police officer and claims administrator, which was not, in fact true, were made because the applicant was in a great deal of shock.

The applicant's attorney argues the video of the incident supports his claim the applicant threw the first punch in fear of a real, present and apparent threat of bodily harm. The applicant's attorney argues the video shows the fight commenced when the applicant turned and was startled to see Williams walking toward him and gaining on him. The applicant's attorney then goes to great length to summarize the films. The attorney argues the surveillance video shows the applicant was in fear of a real and present threat of bodily harm. The applicant's attorney admits that the applicant threw the first punch.

The Arbitrator found the applicant's testimony was not credible. The applicant testified that Williams had a gun and a knife, neither of which was correct. The applicant testified that he mentioned the gun to the police, which he did not.

The applicant testified about being threatened by Williams, however, Williams not only denied these facts, which testimony the Arbitrator found credible, in addition, the police officer testified the only thing the applicant reported was that the driver then exited the car and that Williams called to the applicant and said, "hey, hey, why did you cite me?" and then a fight broke.

This above description was the same one give to the claims administrator except for claiming the driver stuck the applicant first.

The applicant did not relate to the police officer called to the scene about being threatened or any weapons being involved.

The applicant did not tell the police officer that Williams said, "Nigger, you better back off because I am going to shoot you."

The applicant said he was kicked by driver and the video shows that was not correct.

The applicant said he was spit on by Williams, which was denied by Williams and not mentioned to the police.

The Arbitrator found that the applicant contacted Williams over a possible parking violation. The applicant went behind the car and attempted to take a picture of the license plate on Williams' car to issue a parking ticket. The camera did not work and Williams drove around the comer and the applicant walked away.

Williams observed the applicant attempted to take the picture, however, Williams had no way of knowing the applicant's camera did not work.

Williams parked his car and ran toward the applicant asking if the applicant issued a parking ticket.

These conclusions are supported by Williams' testimony and what the applicant told the police officer.

Applicant then admits and the video shows the applicant threw the first punch.

The applicant argues that through his testimony and the video shows that Williams approached him in a menacing and threatening manner.

However, the applicant told the police officer that Williams was only inquiring about whether he was being cited for ticket. Williams credibly testified that was what he was doing by approaching the applicant was to discuss with him whether he or not he was ticketed. This is exactly what the officer was told by the applicant and Williams.

The Arbitrator found applicant's testimony regarding various threats as described above were not made by Williams and were not mentioned to the police officer.

In addition, the applicant misrepresented when he accused Williams of being the initial aggressor by throwing the first punch, which turned out to not be true once the police obtained the video of the incident. The applicant made this allegation that Williams hit him first to both the police officer and the adjuster for the City of Los Angeles.

The Arbitrator found the testimony of Williams credible, based on his description of the events, which were more consistent with the events as reported by the police officer and the video of the incident.

The applicant claiming that the inconsistencies in his testimony were caused by the shock of the moment, is not credible.

Telling the police officer at the scene an hour after the altercation occurred that the applicant was struck first when and that was not true, in the opinion of the Arbitrator, is a material misrepresentation and was not caused by shock.

The applicant repeating this allegation of being hit first to the claims administer two days after the incident occurred was another material misrepresentation and not made because of shock as the incident had ended two days earlier.

The applicant testifying about Williams having guns and knives was not true.

The allegation applicant was spit on by Williams was denied by Williams, not reported to the police officer and was not seen in the video of the incident.

In the opinion of the Arbitrator, these were material misrepresentations were not made because of confusion or the applicant being in shock.

The applicant testifying that Williams threatened him and not mentioning this to the police officer calls into question applicant's credibility.

In the opinion of the Arbitrator, the video alone cannot establish what occurred.

In order to establish what occurred regarding the applicant's claim he was feeling threatened and in fear of imminent bodily harm, you must take into account what was being said. The video consists only of visual and no audio.

The interpretation of the films depends on the credibility of the parties not just viewing the video.

You cannot determine from the film alone what was said, whether Williams was walking in an aggressive manner, whether he had an aggressive demeanor and the films did not show him having clenched fists as far as the Arbitrator observed.

The video shows that Williams was approaching the applicant. You cannot tell from the video without using the testimony of the witness and their credibility whether Williams was approaching in menacing manner.

All you can observe is Williams approaching, they are talking, Williams backs up, the applicant then backed up and then the applicant threw the first punch.

In the opinion of the Arbitrator, the video alone does not support a finding Williams was the initial aggressor. The video does not show Williams making a fist and the video does not show Williams having a weapon.

The video is consistent with the testimony of Williams and the police officer that Williams approached the applicant and during the course of the discussion, Williams was punched by the applicant.

Without taking into accollll.t the testimony and facts surrounding the case, the video by itself is not substantial evidence that the applicant threw the first pllll.ch in fear of imminent bodily harm.

The video only supports the applicant threw the first punch.

III.

RECOMMENDATION

For the foregoing reasons, it is recommended that reconsideration be denied.

DATED: April 26, 2021

Respectfully submitted,

ALTMAN & BLITSTEIN

By: MARK L. KAHN,
ARBITRATOR