

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

MARLENE FAULKNER, *Applicant*

vs.

**THE HAYS GROUP, INC.;
HARTFORD FIRE INSURANCE GROUP, *Defendants***

Adjudication Numbers: ADJ11881346

Pomona District Office

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

On April 26, 2024, applicant filed a Petition for Reconsideration from the Findings and Order issued on April 15, 2024 by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that defendant did not engage in serious and willful misconduct in causing applicant's injury.

Applicant contends that the WCJ erred because the employer consciously disregarded her requests to human resources and failed to maintain a safe work environment.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petitions for Reconsideration, defendant's answer, and the contents of the WCJ's Report. Based on our review of the record, we will deny the petition for reconsideration.

FACTS

Applicant claimed injury to her psyche for the cumulative period ending on August 7, 2018. (Minutes of Hearing and Summary of Evidence (MOH/SOE), March 26, 2024, p. 2, lines 11-14.) Applicant's claim was settled by Compromise and Release, which was approved on March 7, 2023.

Applicant sought an increase in benefits for alleged serious and willful misconduct by her employer.

Applicant was seen by a qualified medical evaluator who detailed applicant's history of industrial psychological injury as follows:

Ms. Faulkner was hired in 2014 but began to experience stress within the first several months of her employment due to the fact that her coworker, Jeff Breskin, abruptly resigned his post, causing her to absorb a larger workload. She indicated that she was hired working approximately 40 hours per week but has been working 50-plus hours on a weekly basis since approximately November 2014. It is important to note that although the increase in work hours was stressful, it was not the increase in work which caused Ms. Faulkner to eventually become unable to continue working at Hays Companies. Instead, she attributes the vast bulk of her stress to the relationship that developed between her and Kirk Aguilera. Ms. Faulkner described an environment within which Mr. Aguilera was frequently screaming at others in a demeaning fashion. Ms. Faulkner was not the only employee screamed at by Mr. Aguilera, but as time went on, she found the environment that he presided over to be rather toxic. She essentially felt as though she was unappreciated and that there was nothing she could do in order to reduce the intensity or frequency of Mr. Aguilera's criticism. She described that Mr. Aguilera would frequently yell at her on a nearly everyday basis, which made the environment at Hays Companies feel very overwhelming. Over the years, Ms. Faulkner attempted to ignore Mr. Aguilera's demeanor and not allow it to bother her. She stated that she did not want to let another person have this much power in her life. The way in which Ms. Faulkner has previously dealt with stress is to simply push through it and attempt to compartmentalize utilizing a variety of primitive coping mechanisms. At the workplace she indicated that she reached out to Leidy, the office manager, on several occasions in order to discuss Mr. Aguilera's behavior and abrasive style. Ms. Faulkner indicated that Leidy would remind her that Mr. Aguilera's style was "just the way he is" and therefore not to be taken personally. On September 1, 2016, however, she felt that Mr. Aguilera's demeanor on a continuous basis was quite overwhelming. Ms. Faulkner does not have a history of making frequent complaints and does not view herself as being a "complainer" by nature. Yet, she reached out to human resources representative Lisa McGhee on September 1, 2016, to indicate that she had recently been "verbally attacked" by Mr. Aguilera. Ms. Faulkner indicated that he yelled at her in front of others, and Ms. Faulkner wanted to document Mr. Aguilera's abusive behavior. She stated that she did not maintain high hopes

that this complaint to Human Resources would result in any behavioral change but likely did maintain some hope that something could be done to improve the workplace environment.

Ms. Faulkner stated it was around the time that her complaint was made (September 1, 2016) that she became tearful multiple times per week and experienced anxiety that led her to have insomnia. She essentially continued to push through her highly overwhelming symptoms caused by the stressful environment at Hays Companies before a specific incident on August 7, 2018, occurred that essentially served as the straw that “broke the camel’s back.” Ms. Faulkner had been asked by a producer at the company to provide assistance and her own personal expertise in order to assist a Hays Companies client. Initially, Kirk Aguilera did not provide approval for Ms. Faulkner to provide this assistance which was asked of her but later on reversed course. Mr. Aguilera did in fact write an email that provided Ms. Faulkner with the approval in order for her to move forward and provide the assistance that was initially asked of her by Gordon, a producer at the company. Ms. Faulkner did not have any personal interest in providing extra assistance to Gordon or the company's client apart from simply being a team player. Instances like this had also served to provide Ms. Faulkner with a positive feeling about her worth and value at the company. She did not frequently receive praise from Mr. Aguilera, rather receiving very frequent criticism. However, the fact that producers wanted to use her expertise in order to sell their services to clients helped her to feel good about herself. While she was on site assisting the client in the process that she had been instructed to do by Mr. Aguilera, she received several phone calls from Mr. Aguilera, who was at that time on vacation, criticizing her for having participated in the very process that he had authorized. Ms. Faulkner stated that Mr. Aguilera berated her over the phone and denied that he had ever provided her the instruction to participate in this specific process (though he had). This incident led Ms. Faulkner to feel overwhelmed, embarrassed, sad, and anxious. For quite some time, Ms. Faulkner had experienced a heightened stress level causing anxiety which led to grinding her teeth at night. She developed substantial jaw pain associated with grinding her teeth that further interfered with her ability to gain restful, restorative sleep. She had been feeling anxious and irritable already, but after the event of August 7, 2018, she began to feel as though she might not be able to continue working at Hays Companies due to the stressful and hostile working environment. She indicated that several times she had asked to be able to work remotely. She noted that she was spending a great deal of time working outside of the office and frequently traveled. Her desire to work remotely, however, was always rebuffed. Following the August 7, 2018, incident with Mr.

Aguilera, her desire to work remotely substantially increased, as she began to feel as though any continued personal contact with Mr. Aguilera would maintain her overwhelming stress.

Ms. Faulkner continued to work at Hays Companies until September 11, 2018, when she left in order to have surgery for a nonindustrial issue that had developed. She continued to work remotely after her surgery, but on September 17, 2018, she emailed Hays Companies and informed them of her decision to resign, as it had been made clear that she would not be able to work remotely, and she felt that she would be unable to return to work because she could no longer tolerate an environment that she perceived to be hostile. She was certain that she could no longer tolerate working with Mr. Aguilera any further.

(Applicant's Exhibit 2, Report of Jared Maloff, Psy.D., August 15, 2019, pp. 32-34.)

DISCUSSION

“An award for serious and [willful] misconduct is ‘of the nature of a penalty.’ Such an award can be sustained only if the evidence establishes and the [WCAB] finds every fact essential to its imposition.” (*Dowden v. Industrial. Acc. Com.* 223 Cal.App.2d 124 at p. 129 [28 Cal.Comp.Cases 261], quoting *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d 102, 108 [18 Cal.Comp.Cases 3] (*Mercer-Fraser*).)

“The term ‘serious and [willful] 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’.” (*Mercer-Fraser, supra*, 18 Cal.Comp.Cases at p. 11.) As stated in *Mercer, supra*,

To constitute 'willful 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.

While the line between gross negligence and willful misconduct may not always be easy to draw, a distinction appears . . . in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while willful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences.

Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result.

A finding that an employer is guilty of serious and willful misconduct in failing to act for employee safety must “be based on evidence that [the employer] deliberately failed to act for the safety of [its] employees, knowing that [its] failure would probably result in injury to them.” (*Rogers Materials Co. v. Industrial Acc. Com.* (1965) 63 Cal.2d 717, 722 [30 Cal.Comp.Cases 421, 423]; *Mercer-Fraser, supra*, 18 Cal.Comp.Cases at p. 11.) Thus, in the context of an alleged failure to act for employee safety, an employer guilty of serious and willful misconduct must (1) know of the dangerous condition, (2) know that the probable consequences of its continuance will involve injury to an employee, and (3) deliberately fail to take corrective action. (*Johns-Manville Sales Corp. v. Workers' Comp. Appeals Bd. (Horenberger)* (1979) 96 Cal.App.3d 923, 933 [158 Cal. Rptr. 463, 44 Cal.Comp.Cases 878]; *Mercer-Fraser, supra*, 18 Cal.Comp.Cases at p. 11; *Rogers Materials, supra*, 30 Cal.Comp.Cases at pp. 423-424; *Dowden, supra*, 28 Cal.Comp.Cases at p. 265.)

The injured worker has the burden of proving the elements of serious and willful misconduct by the employer before additional compensation is allowed by section 4553. (See *Dowden, supra*, 27 Cal.Comp.Cases at p. 264.) The employer’s misconduct must be performed by an executive, general superintendent, general partner, managing officer or managing representative. (Lab. Code, § 4553; *Bigge Crane & Rigging Co. v. Workers' Comp. Appeals Bd. (Hood)* (2010) 188 Cal.App.4th 1330 [116 Cal. Rptr. 3d 153, 75 Cal.Comp.Cases 1089].)

Here, applicant has failed her burden of proving serious and willful misconduct. While we do not condone the conduct of applicant’s supervisor in this matter, it does not rise to the level of serious and willful misconduct or the type of “quasi-criminal” conduct described in *Mercer, supra*. While applicant’s perception may be both real and valid, the fact that applicant’s perception of her supervisor’s conduct caused psychological injury is not sufficient to find that the supervisor intentionally or recklessly caused such injury under the standard articulated in *Mercer, supra*.

Accordingly, we will deny applicant’s petition for reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration from the Findings and Order issued on April 15, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 25, 2024

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

**MARLENE FAULKNER, IN PRO PER
LITTLER MENDELSON, P.C.**

EDL/mc

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