WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MICHELE NIHIPALI, *Decedent*

vs.

EPIC CARE; NOVA CASUALTY COMPANY, *Defendants*

Adjudication Number: ADJ10431615
San Francisco District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of March 22, 2024, wherein it was found that applicant's injury was not caused by defendant's alleged serious and willful misconduct, and that applicant was thus not entitled to increased compensation pursuant to Labor Code 4553 or 4553.1. In this matter, in a Compromise and Release approved on November 10, 2020, applicant settled her claims that while employed on March 2, 2016 as X-ray/mammography technician, she sustained industrial injury to the jaw, neck, nervous system, face and brain in exchange for $249,100.

Applicant contends that the WCJ erred in finding that defendant's conduct was not "serious and willful" pursuant to Labor Code section 4553 or 4553.1. We have received an Answer. The WCJ who presided over the case and issued the decision was not available to write the report contemplated by Appeals Board Rule 10962 (Cal. Code Regs., tit. 8, § 10962), and thus a report was filed by the presiding workers' compensation judge of the San Francisco District Office.

For the reasons stated below (some of which is duplicative of the WCJ) and for the reasons stated by the WCJ in the Opinion and Decision which we quote below, we will deny the applicant's Petition.

In *Bigge Crane & Rigging Co. v. Workers' Comp. Appeals Bd. (Hunt)* (2010) 188 Cal.App.4th 1330, 1349-50 [75 Cal.Comp.Cases 1089], the Court of Appeal spoke of the "rigorous" (*id.* at p. 1350) standards necessary to support a finding of serious and willful misconduct, summarizing the Supreme Court's seminal decision in *Mercer-Fraser Co. v. Industrial Acci. Com. (Soden)* (1953) 40 Cal.2d 102 [18 Cal.Comp.Cases 3] thusly:

The Supreme Court discussed the meaning of serious and willful misconduct at length, contrasting such conduct with conduct that is negligent or even grossly negligent. (*Mercer-Fraser, supra*, 40 Cal.2d at pp. 116–118.) "'Wilful misconduct … 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.'" (*Id.* at p. 117, quoting *Porter v. Hofman* (1938) 12 Cal.2d 445, 447 [85 P.2d 447].) "'Wilfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences.'" (*Mercer-Fraser*, at p. 117, quoting *Porter*, at p. 448.)

"'"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*, 40 Cal.2d at p. 117, italics omitted, quoting *Porter v. Hofman, supra*, 12 Cal.2d at p. 448.)

"'While the line between gross negligence and wilful 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 wilful 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. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the [L]egislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence and that this misconduct must be wilful. While the word "wilful" implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But wilful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Wilful 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.'" (*Mercer-Fraser, supra*, 40 Cal.2d at p. 118, quoting *Meek v. Fowler* (1935) 3 Cal.2d 420, 425–426 [45 P.2d 194].)

As explained by the WCJ in the Opinion on Decision, while possibly negligent, leaving a metal cart in a room adjacent to a magnetic resonance imaging machine, not knowing that someone would transport it into the room with the machine does not equate to a deliberate intent to harm or proceeding in the face of a known risk with knowledge that serious injury was probable.

Additionally, as noted by the WCJ, finding serious and willful misconduct on the basis of violation of a safety order requires the defendant's "actual knowledge" of the safety order. *(Hunt, supra* at pp. 1354-1355.) Here, the applicant did not establish that defendant had actual knowledge of any breached safety order proximately causing the applicant's injury.

We otherwise deny applicant's Petition for the reasons stated in the Opinion on Decision quoted below:

Analysis

> Applicant alleges violation of Labor Code sections 4553 and 4553.1 due to lack of training and the absence of an Injury and Illness Prevention Program.
>
> 1. *Labor Code section 4553.*
>
> Labor Code Section 4553 provides as follows:
>
> > "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.
>
> In the seminal case of *Mercer-Fraser Co. v. Industrial Accident Com. (1953) 40 Cal.2d 102*, serious and willful misconduct is defined as conduct that "necessarily involves deliberate, intentional or wanton conduct in doing or omitting to perform acts, with the knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom". "Willfulness necessarily involves the performance of a deliberate act or intentional act or omission regardless of the consequences" (*Mercer-Fraser, supra at 117*).

"Willful misconduct means something different from and more than negligence, however gross. 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'…The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. 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…" (*Mercer-Fraser, supra at 117*).

The basis for serious and willful misconduct has been 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. 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 932, 933 [44 Cal Comp Cases 878] citing Mercer- Fraser, supra; Hawaiian Pineapple Co. v. Ind. Acc. Com. (1953) 40 Cal2d 656; Dowden v. Industrial Acc. Com. (1963) 223 Cal.App.2d 124, 130-131*.)

If the danger involved is part of the working environment, however, and the use of a particular piece of equipment is permitted by OSHA, an employer may not be liable for serious and willful misconduct. *(See American Smelting & Refining Co. v. Workers' Compensation Appeals Bd. (Rael)(1978) 79 Cal App.3d 615, 623 [44 Cal Comp Cases 424].)*

After careful review of the evidence in this case, including the testimony of applicant, I cannot find that any of defendant's actions, or alleged inactions, rise to the level of a serious and willful misconduct violation.

Pursuant to applicant's testimony, from her prior training as well as her previous employment as a supervisor in the radiology department at Highland Hospital, she was aware of the dangers presented by the active magnet in the MRI machine, was aware that the magnet is always on and that you cannot take metal objects into the vicinity of an MRI. She further acknowledged having conversations about not being able to wear metal pins on her lapel in the vicinity of the MRI at Epic Care before the accident. She also indicated that nobody at Epic Care directed her to perform the task that resulted in the industrial injury in

this case, i.e. nobody at Epic Care asked applicant to wheel the cart which turned out to be made of metal into the MRI room.

On the contrary, applicant testified that she wheeled the cart into the room on her own initiative and that she was attempting to be helpful and proactive. She further testified that the cart was covered by a sheet and that she did not check the cart to see whether it was MRI safe, but that she assumed that it was safe.

Applicant also raises Labor Code section 6400, which states that every employer shall furnish employment that is safe and healthful for the employees therein. In this case, a certain danger was part of the working environment simply due to the presence of the MRI machine. As indicated above, applicant was aware of that danger.

While it appears unwise to have items that cannot safely be brought into the vicinity of the MRI in the room directly adjacent to the MRI, this does not rise to the level of being "quasi-criminal" in nature, especially in view of applicant's acknowledgement that she knew about the dangers of taking metal near an MRI.

2. *Labor Code section 4553.1.*

Labor Code Section 4553.1 provides as follows:

> "In order to support a holding of a serious and willful misconduct by the employer based upon violation of a safety order, the appeals board must specifically find all of the following:
>
> (1) The specific manner in which the order was violated;
>
> (2) That the violation of the safety order did proximally cause the injury or death, and the specific manner in which the violation constituted the proximate cause;
>
> (3) That the safety order, and the conditions making the safety order applicable, were known to, and violated by, a particularly named person, either the employer or a representative designated by Section 4553, or that the condition making the safety order applicable was obvious, created a probability of serious injury, and that the failure of the employer, or a representative designated by Section 4553, to correct the condition constituted a reckless disregard for the probable consequences"

Applicant cites one safety order that she contends was violated by defendant's actions, Cal. Code Regs. § 3203, requiring a written injury and illness prevention program.

As evidenced by the OSHA notice of intent and the citation and notification of

penalty (exhibits 1 and 2, respectively) and acknowledged by Mr. Roth in his letter to OSHA (exhibit 3) defendant did not have a written injury and illness prevention program and was not in compliance with section 3203.

It is questionable, however, that violation of the safety order, or not having a written illness and injury prevention program in place, did proximally cause the injury sustained by applicant in this case, as applicant testified, as referenced above, that she was already aware of the danger posed by an MRI and its magnet. It is also unlikely that a written plan would have included information on what particular cart would have been in what particular of defendant's locations on any given day.

In addition, it does not appear that applicant has demonstrated that defendant knew of the safety order in question. In *Torrez-Lopez v. Workers' Comp. Appeals Bd.* (2010) 75 CCC 919 (writ denied), the Appeals Board found no violation of LC 4553.1 when there was no evidence that a supervisor was aware of Cal. Code Regs. §1670. (See also *Eastwood v. Cooper Construction*, 2015 Cal. Wrk. Comp. P.D. LEXIS 587 (applicant did not prove defendant knew of the safety order or of any condition making the safety order applicable). In fact, Mr. Roth testified that defendant was not aware that formal training was required.

Therefore, I cannot find that defendant violated Labor Code section 4553.1 in this case.

Acknowledging the severity of applicant's injuries and the unfortunate proximity of the MRI-unsafe cart to the MRI room, I cannot find that any of defendant's actions, or inactions, rise to the level of a violation Labor Code sections 4553 or 4553.1. Therefore, I find that applicant has not met her burden of proof with respect to her petition for increased compensation.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Order of March 22, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ _ KATHERINE WILLIAMS DODD, COMISSIONER ____

I CONCUR,

/s/ _ JOSEPH V. CAPURRO, COMMISSIONER _

/s/ _ JOSÉ H. RAZO, COMMISSIONER _____

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 11, 2024

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

MICHELE NIHIPALI
SMITH & BALTAXE
BOWLES & VERNA

DW/oo

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