WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TIWART KYORKIAN, *Applicant*

vs.

RICHARD GUSTAFSON;
OAK RIVER INSURANCE COMPANY, c/o
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ12730898

Santa Rosa District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration of the Findings and Order (F&O) issued on October 26, 2021, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that applicant's injury to the bilateral knees, which occurred on January 30, 2019, was presumptively accepted pursuant to Labor Code[2], section 5402; however, the WCJ further found that applicant's claim was barred by section 3600(a)(7) because it arose from an altercation where applicant was the initial physical aggressor.

Applicant contends that the WCJ erred because the evidence did not establish that applicant was an initial physical aggressor.

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

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[1] Commissioner Lowe was on the panel that issued the order granting reconsideration. Commissioner Lowe no longer serves on the Appeals Board. A new panel member has been substituted in her place.

[2] All future references are to the Labor Code unless noted.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the October 26, 2021 F&O and substitute a new finding that applicant's injury was presumptively accepted as industrial, and that defendant failed its burden of proving that applicant was an initial physical aggressor.

FACTS

Applicant was working as an auto painter when he claimed to have sustained industrial injury to his bilateral knees on January 30, 2019. (Minutes of Hearing and Summary of Evidence, August 10, 2021, p. 2, lines 7-11.) While applicant was represented at trial and applicant's attorney has not filed any petition to be relieved as counsel, applicant filed the petition for reconsideration in pro per.

Applicant was evaluated by Qualified Medical Evaluator (QME) Stuart Rubin, M.D., who took the following history of injury:

> This is a 54-year-old gentleman who on January 30, 2019 while at work working for Rich's Auto Body and Fender was pushed by a coworker. He fell forward landing on his right knee. He was on crutches for three months and then developed left knee pain. He lost approximately 19 months of work. He takes Ibuprofen for his pain. No other work injuries reported.
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> On 04/12/19, MRI of the right knee revealed a tear of the medial meniscal posterior horn/body junction and body with adjacent parameniscal cysts. On 05/21/19, he started complaining of left knee pain since he started walking in March 2019. The examinee reports that he was scheduled for surgery multiple times. The surgery was canceled because of medical reasons including diabetes.

(Applicant's Exhibit 3, Report of Stuart Rubin, M.D., July 20, 2020, p. 3.)

Applicant testified at trial that on the day of injury he and a coworker argued about the manner in which the coworker prepared a car for painting. (MOH/SOE, *supra* at p. 4, lines 12-20.) The coworker told applicant "Don't tell me what to do." (*Ibid*.) He threatened applicant. (*Ibid*.)

Applicant tried to walk past the coworker, but the coworker blocked applicant. (*Id*. at p. 4, lines 22-29.) Applicant may have touched the coworker as he walked past him. (*Ibid*.) The coworker then pushed applicant. (*Ibid*.)

The coworker who pushed applicant did not testify.

Another worker in the shop that day testified that he had heard the argument, but "He did not see a lot." (MOH/SOE, *supra* at p. 6, line 33.)

The witness was a car length away when the altercation happened. "He didn't see much. He heard it all." (*Id*. at p. 7, line 21.) He testified that applicant gave the coworker a jab in the shoulder. (*Id*. at p. 7, lines 21-22.)

The QME found that applicant's injury was industrial as a result of applicant falling. He noted that applicant injured his right knee directly and suffered a compensable consequence injury to the left knee after ambulating on crutches. (Exhibit 3, at p. 21.)

Applicant completed a DWC-1 form (Applicant's Exhibit 2.) and mailed it to his employer via certified mail on February 25, 2019. (Applicant's Exhibit 1.) Defendant states in its briefing that it denied the claim approximately 45 days after applicant filed his application for adjudication in November 2019, which was not timely. No denial letter is in evidence.

DISCUSSION

When applicant claims a physical injury, applicant has the initial burden of proving industrial causation by showing the employment was a contributing cause. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302; § 5705.) Applicant must prove by a preponderance of the evidence that an injury occurred AOE/COE. (Lab. Code[3], §§ 3202.5; 3600(a).)

> The requirement of Labor Code section 3600 is twofold. On the one hand, the injury must occur in the course of the employment. This concept ordinarily refers to the time, place, and circumstances under which the injury occurs. On the other hand, the statute requires that an injury arise out of the employment. It has long been settled that for an injury to arise out of the employment it must occur by reason of a condition or incident of the employment. That is, the employment and the injury must be linked in some causal fashion. (*Clark*, 61 Cal.4th at 297 (internal citations and quotations omitted).)
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> * * *

[3] All future references are to the Labor Code unless noted.

> The statutory proximate cause language [of section 3600] has been held to be less restrictive than that used in tort law, because of the statutory policy set forth in the Labor Code favoring awards of employee benefits. In general, for the purposes of the causation requirement in workers' compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury.

(*Clark, supra* at 298 (internal citations and quotations omitted).)

Section 3600(a)(7) bars an employee's claim for compensation where the injury arises out of an altercation in which the injured employee is the initial physical aggressor. Section 3600(a)(7) is an affirmative defense and defendant, as the party asserting the defense, has the burden of proof. (§ 5705.)

> Section [3600(a)(7)] bars recovery only when two conditions are present. First, the injury for which workmen's compensation is sought must "arise out of an altercation." Second, the injured employee must be the "initial physical aggressor" in that altercation. Section 3202 enjoins us to construe the workmen's compensation provisions of the Labor Code liberally "with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Consequently, the provisions of section [3600(a)(7)] which deny compensation to persons so injured, must be narrowly and strictly construed. (See *Fruehauf Corp. v. Workmen's Comp. App. Bd.*, [(*Stansbury*)] (1968) 68 Cal. 2d 569, 577 [33 Cal. Comp. Cases 300, 68 Cal. Rptr. 164, 440 P.2d 236].)
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> To "arise out of an altercation," as required by section 3600, subdivision (g), an injury must result from an exchange between two or more persons characterized by an atmosphere of animosity and a willingness to inflict bodily harm. An altercation is distinguishable from "horseplay" or "skylarking," neither of which involves such animosity, although either may result in bodily harm. (*Litzmann v. Workmen's Comp. App. Bd.,* (1968) 266 Cal. App. 2d 203, 209–210 [33 Cal. Comp. Cases 584, 71 Cal. Rptr. 731]; [**9] *Argonaut Ins. Co. v. Workmen's Comp. App. Bd.* (*Helm*) (1967) 247 Cal. App. 2d 669, 682–683 [32 Cal. Comp. Cases 14, 55 Cal. Rptr. 810].)
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> * * *

> The second condition of section [3600(a)(7)] presents more difficulty; it requires us to determine what type of conduct the Legislature intended to discourage when it denied compensation to an "initial physical aggressor." As Larson has pointed out, one of the practical difficulties in attempting to bar an aggressor from benefits is "the homely fact that, long after a quarrel is over, it is often almost impossible to determine who really started it." (1 Larson, Workmen's Compensation Law (1968 ed.) § 11.15 (c), p. 159.) Section [3600(a)(7)] "imposes the necessity of selecting one overt act out of a series of hostile verbal, psychological, and physical acts as the one that, for compensation purposes, caused the quarrel and elicited the ultimate injury." (*Id*.)
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> The Legislature's use of the word "physical" indicates that it was primarily concerned with the increased risk of injury which arises when a quarrel moves from an exchange of hostile words and nonviolent gestures to a trading of physical blows. Thus, one is not an "initial physical aggressor" so long as he confines his antagonism to arguments, epithets, obscenities or insults. Instead, an "initial physical aggressor" is one who first engages in physical conduct which a reasonable man would perceive to be a "'real, present and apparent threat of bodily harm . . . .'" (*Briglia v. Industrial Accident Commission* (1962) 27 Cal. Comp. Cases 217, 218.)

(*Mathews v. Workmen's Compensation Appeals Bd*., (1972) 37 Cal. Comp. Cases 124, 127-128.)

Here, we agree with the WCJ's analysis as to the fact that applicant's claim was presumptively accepted. Applicant provide evidence that he served the DWC-1 upon the employer on February 25, 2019. Defendant produced no evidence regarding its denial of the claim. Accordingly, the claim is presumptively accepted. However, even if the claim were not presumptively accepted, it would be found industrial based upon the reporting of the QME.

Defendant produced insufficient evidence to meet its burden of proof as to the initial physical aggressor defense. The coworker involved in the altercation did not testify. The entirety of defendant's case rests upon the testimony of a witness who testified multiple times that he did not see much and that he mostly heard what was happening.

The evidence establishes, and applicant admits that he may have touched the coworker he was arguing with as he walked by him. The evidence is not clear what the nature of this touch was, and thus on the present record we cannot find that applicant touching the coworker while walking past him constituted a real, present and apparent threat of bodily harm.

Accordingly, as our Decision After Reconsideration we will rescind the October 26, 2021 F&O and substitute a new finding that applicant's injury was presumptively accepted as industrial, and that defendant failed its burden of proving that applicant was an initial physical aggressor.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on October 26, 2021, is **RESCINDED** with the following **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Tiwart Kyorkian, who was 53 years old on the date of injury, while employed on January 30, 2019 as a journeyman auto painter, occupational group number 321, at Petaluma, California by Richard Gustafson, sustained injury arising out of and in the course of employment to his bilateral knees.

2. Defendant failed to prove that applicant's injury arose out of an altercation in which applicant was the initial physical aggressor, and thus, applicant's claim is not barred by Labor Code section 3600(a)(7).

3. Defendant failed to timely deny applicant's claim within 90 days of service of the DWC-1 claim form, and thus, defendant presumptively accepted applicant's claim.

4. Notwithstanding the presumption of compensability, applicant presented substantial medical evidence that his injury was caused by the events of employment that occurred on January 30, 2019.

5. All other issues, including the issue of temporary disability, is deferred to the parties to adjust with jurisdiction reserved at the trial level in the event of a dispute.

ORDER

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 8, 2024

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

TIWART KYORKIAN
MEECHAN, ROSENTHAL & KARPILOW
LAW OFFICES OF RICHARD GREEN

EDL/mc

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