**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**ARMANDO RODRIGUEZ, *Applicant***

**vs.**

**CITY OF WATSONVILLE, administered by LWP CLAIMS, INC., *Defendants***

**Adjudication Numbers: ADJ16354315; ADJ17880338**
**Salinas District Office**

# OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is

reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on February 3, 2025, and 60 days from the date of transmission is April 4, 2025. This decision is issued by or on Friday, April 4, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on February 3, 2025, and the case was transmitted to the Appeals Board on February 3, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on February 3, 2025.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**April 4, 2025**

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

**ARMANDO RODRIGUEZ**
**GLYNN FALCON, ESQ.**
**MACINTYRE & WHITE, LLP**

**AS/mc**

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

## REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

## I

## INTRODUCTION

On 1/10/25, Applicant filed a timely, verified Petition for Reconsideration (EAMS Doc. ID: 55778237) of the undersigned's Findings and Order that issued on 12/24/24. (EAMS Doc. ID: 78710649.) On 1/13/25, Defendant filed an Answer. (EAMS Doc. ID: 55881424.)

## II

## FACTS

Applicant, Armando Rodriguez, while employed on 5/3/22 in ADJ16354315 as an Airport Operations Specialist III, Occupational Group number 341, at Watsonville Municipal Airport, California, by the City of Watsonville, permissibly self-insured, sustained injury AOE/COE to his lumbar spine. The parties resolved the case-in-chief by Joint Stipulations with Request for Award and Award (includes 4/26/22 DOI, ADJ17880338) on 6/30/23. (EAMS Doc. IDs: 76899370 and76899390.)

Thereafter, the issues of discrimination per Labor Code section 132a and Serious and Willful Misconduct were tried over the course of three non-consecutive days. (Minutes of Hearing, 2/7/2024 Trial [EAMS Doc. ID: 77913606]; Minutes of Hearing and Summary of Evidence, 6/5/24 Trial, [EAMS Doc. ID: 78710640]; and Minutes of Hearing and Summary of Evidence, 8/27/24 Trial, [EAMS Doc. ID: 78710644].)

The undersigned found that the applicant had not proven discrimination pursuant to Labor Code Section 132a and had not proven that he was injured due to the Employer's serious and willful misconduct. (Findings & Order, 12/24/24, Findings 6 and 7, p. 1.) The applicant also alleges error in admitting Defendant's Exhibits D-5 through D-33. It is from these findings that the applicant petitions for reconsideration.

## III

## DISCUSSION

A WCJ's report "cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313." (*City of San Diego v. Workers' Comp. Appeals Bd (Rutherford)* (1989) 54 Cal. Comp. Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd* (1980) 45 Cal. Comp. Cases 1026 (writ den.).) To the extent that the undersigned failed to elaborate on her conclusions, they will be discussed below.

At the 2/7/24 Trial, both parties objected to most of the other side's exhibits. On 8/27/24, all of the exhibits were admitted into evidence, with the exception of newly identified Applicant's Exhibit A-71. (MOH & SOE, 8/27/24, p. 13.) No further objections to admitting the exhibits into evidence were made at that time. Exhibit A-71 was later admitted by order in the 12/24/24 F&O. The undersigned saw no prejudice to the applicant in admitting Exhibits D-5 through D-33, because the documents were sourced from the applicant's own record requests. The documents were in the applicant's possession; and, there was ample time for his review between the identification of the exhibits on 2/7/24 and their admission into the record on 8/27/24. The undersigned admitted all of the documents in fairness to the parties and to provide for a complete record.

### 132a Petition

The applicant claimed that his employer subjected him to discrimination for filing a workers' compensation claim. In his Petition for Penalties for Violation Of Labor Code Section 132a, the applicant alleged that on or about 6/22/22, the Airport Manager, Sam Rosas, issued a written reprimand to him for failing to call back while "on call" and that Mr. Rosas did so at the instigation of his superior, Director Rayvon Williams, "because applicant was injured on the job, had medical work restrictions, and had filed or made known his intent to file a Workers' Compensation Claim." (132a Petition, filed on 7/20/22, p. 2, para. 4; EAMS Doc. ID: 75732864.)

Pursuant to Labor Code section 132a, it is unlawful to discriminate "against workers who are injured in the course and scope of their employment."

> [T]o warrant an award [pursuant to section 132a] the employee must establish at least a prima facie case of lost wages and benefits caused by the discriminatory acts of the employer." (*Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1386.) The employee must establish discrimination by a preponderance of the evidence (*Western Electric Co. v. Workers' Comp. Appeals Bd.* (1979) 99 Cal. App. 3d 629, 640), at which point the burden shifts to the employer to establish an affirmative defense (*Barns v. Workers' Comp. Appeals*

*Bd.* (1989) 216 Cal. App. 3d 524, 531)." (*Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1298.)

Pursuant to 8 C.C. R. § 10528, a 132a petition must set forth "specifically and in detail the nature of each violation alleged, facts relied upon and the relief sought. *Each alleged violation must be separately pleaded*." (Emphasis added.) The applicant never alleged any violation other than the 6/17/22 (or 6/22/22) reprimand.

Mr. Rosas, Applicant's supervisor, testified that he issued the reprimand, because the applicant failed to call back or go into work while scheduled to be on call for 6/17/22. (MOH & SOE, 6/5/24 Trial, p. 4, lines 4.5-8.5.) Mr. Rosas stated the facts leading to the Written Memorandum, as follows:

> This is a written reprimand for your failure to properly respond to a Call Back to work while On call per Section 1.3 of the MOU between OE3 and the City of Watsonville on June 17, 2022. As you know, all Airport Operation Specialists rotate the on-call duty on a weekly basis. An employee may be called back to work during this time either after hours or on their days off for such reasons as fueling aircraft or providing coverage at the Airport to maintain minimum staffing levels to comply with Airport Policy and to ensure safety on the field. Employees who are unable to fulfill on-call duties are required to find a replacement.
>
> The Airport was short staffed and Staff was scheduled to pick up interns at 12:30 pm requiring two airport employees pick them up. As a result, the airfield would be left with one person on site, which is against the Airport's Policy. This incident affected the Municipal Airport's commitment to and at all times adhere to Airport's guiding principles of Safety, Service and Self-sustaining operations under the Airport Admin Policies. (Appl's Ex. A-15: Airport Memo Regarding Written Reprimand to Armando Rodriguez, Airport Operations Specialist III, Sam Rosas, Airport Operations Manager, 6/17/22, p. 1, emphasis in original.)

At trial, the applicant was questioned regarding the Airport's requirement that two employees, at minimum, be present during working hours. At defense counsel's request, Applicant read into the record from a 12/18/20 airport memo, "Subject: Airport Administrative Policies (update of version 20201218)," at page 10 of Defendant's Exhibit D-2, as follows:

> The Municipal Airport is part of the Federal Aviation Administration's (FAA) National Plan of Integrated Airport Systems (NPIAS) and as such is classified as significant to national air transportation in the United States. ***Given this role, airport employees should, at all times, be prepared to be at the airport should staffing needs require their presence.*** (Emphasis added.)

Applicant responded that this statement has nothing to do with being on call. (MOH & SOE, 8/27/24 Trial, p. 8, lines 1-7.) (The Airport's On Call Policy at the time was set forth in the union's MOU, section 1.3, which provided for compensation for a union employee who was called back to work. (Appl's Ex. A-71.) Continuing on, Defense Counsel asked the Applicant to read into the record bullet point 12, on page 12 of the same document, which states,

> For reasons consistent with safety, the Municipal Airport ***must be staffed with a minimum of two employees during working hours***. Crew leads are responsible to ensure this staffing requirement is consistently maintained. All employees must be knowledgeable of and able to effectively execute the Airport's Emergency Action Plan. (Emphasis added.)

The applicant acknowledged this policy and responded, "It would be reasonable for someone to be called in under the memo in Defendant's Exhibit D-2, if short staffed. (MOH & SOE, 8/27/24, p. 7, lines 20.5-24.5, p. 8, lines 1-7.) The undersigned sees no connection between the applicant's work injury and the written reprimand. The applicant did not establish that the reason for the 6/17/22 reprimand was due solely to his workers' compensation injury claim. (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 669.)

In his Petition for Reconsideration, the applicant alleges that the undersigned ignored Exhibit A-50, Applicant's so-called "smoking gun," a printout of text messages, dated 4/29 through 5/27/[2022]." Although Exhibit A-50 was referred to repeatedly at trial, Applicant did not specifically plead a 132a violation arising out of this purported plan of retaliation. Applicant never filed a second nor amended pleading setting forth additional allegations. In any event, the undersigned did not ignore Exhibit A-50 in coming to her decision.

Applicant alleges that Exhibit A-50 is absolute proof of his superiors' plan to discriminate against him due to his work injury. In his Petition for Reconsideration, Applicant stated,

> It wasn't until the March 2023 documents were received, then reviewed, by applicant's counsel (now almost a year later after the 132a petition was filed) did applicant discover that, within minutes of learning the applicant had called in to work reporting his work injury that the employee's boss, Rayvon Williams,

> in text messages with the airport manager, Sam Rosas, decided to retaliate against this petitioner with a systematic plan and unlawful scheme. Their written plan was to do the following future acts: *"OK…but this time will be different. Why? Cause we will take a different tack. (1) when his review comes up it will be unsat.(2) he will not receive a merit increase.(3) he will be placed on a PIP for 90 days.(4) if he does not improve[,] we will recommend demotion. Natalie has requested HR see the performance review prior to sharing with Armando [sic]."* (Appl's Pet. for Recon., p. 2.)

The applicant further alleges that, as a result of said discrimination, "he has been denied full benefits, and his [sic] has been threatened with, and now faced with, termination of, demotion, or suspension from his employment, which will result in lost wages, lost seniority, and lost health and other employee benefits of an amount to be determined." (Appl's 132a Petition, p. 2.)

In support of his allegations, Applicant points to the fact that he steadily earned merit salary increases and promotions. However, the truth was that the applicant's performance reviews evidenced a decrease in the applicant's quality of work around June 2020, during the COVID lockdown. (Appl's Exs. A-7 through A-13: Annual Performance Evaluations, April 2015 through April 2021, April 2022 through April 2023.)

An examination of the applicant's annual performance reviews showed that the applicant's performance reviews were merely satisfactory overall. (Appl's Exs. A-7 through A-10: Annual Performance Evaluations, April 2015 through April 2019.) Applicant's April 2019 to April 2020 evaluation was the first and only one to be rated at "highly satisfactory." (Appl's Ex. A-11: Annual Perf. Review, Apr. 2019-Apr. 2020.) From April 2020 to April 2021, the applicant minimally met expectations, with three out of seven areas marked below expectations. (Appl's Ex. A-12: Annual Perf. Review, Apr. 2020-Apr. 2021.)

Applicant was placed on a Performance Improvement Plan (PIP) on 2/1/22, prior to the work injuries of 4/26/22 and 5/3/22, not because of the injuries. (Appl's Ex. A-18: Airport Memo to Armando Rodriguez, Airport Operations Specialist III, Regarding Performance Improvement Plan, Deficiencies and Expectations, with attached page entitled Areas of Improvement, Rayvon Williams, Airport Director, 2/1/22.) Per this PIP memorandum, the applicant had been counseled many times regarding his performance issues. "During the past months, from April until December 2021, It has become increasingly evident that you have not been performing your assigned work in accordance with what is expected of an Airport Operations Specialist III. On multiple dates (2/2/2021, 2/11/2021, 3/10/2021, 3/11/21, 3/12/2021, 4/18/2021, 4/27/21, 6/30/21, and 7/30/21) and during your August

2021 performance review you were counseled about this performance and it was clearly noted what would be expected going forward." (Ibid.)

The record supports that management was already taking measures to improve the applicant's work performance prior to the work injuries. Airport Director Rayvon Williams testified that not all of the possible disciplinary measures discussed in Exhibit A-50 were implemented. "Instead of a 90-day PIP, the applicant was placed on a 60-day PIP. In both exhibits [A-50 and A-38], he indicated that he would recommend demotion if the applicant did not improve. The applicant would not be placed on the PIP until after he returned from a work injury. Not everything in his May 2022 text message to Mr. Rojas (Exhibit A-50) came to fruition on the performance review issued later. The applicant was not recommended for either promotion or demotion and was not placed on a 90-day PIP." (SOE, 6/5/24, p. 12, lines 15-24.5, p. 13, lines 1-4.5.)

> Applicant has neither proven discrimination nor damages. His 2021-2022 review (not in evidence) was held in abeyance, as of a meeting held on 2/1/23, which included the applicant, Mr. Williams, Mr. Rosas, Nathalie Manning from HR, and union representative, Joaquin Vasquez. Instead, a PIP for the period of 2/1/23 through 5/1/23 was implemented. (Appl's Ex. A-33: E-mail regarding 2/1/23 Meeting Follow-up - PIP between Sam Rosas and Nathalie Manning, 2/2/23.) It does not appear that his April 2022 through April 2023 Performance Review was ever completed--the document in evidence is unsigned and undated. (Appl's Ex. A-13: Annual performance review for 4/28/22 through 4/28/23, unsigned and undated.) Although a merit salary increase was not recommended in that review, the applicant did not prove that either the 2021-2022 or the 2023- 2024 performance review was ever implemented or that a detrimental personnel action occurred. The last personnel action form in file is from 4/25/21, which shows that Applicant received a merit salary increase. (Appl's Ex. A-29: Change Personnel Action Form, City of Watsonville, effective 4/25/21.) There are no personnel action forms in evidence that would indicate that applicant has lost salary, benefits, or seniority as a result of termination, suspension of employment, or demotion.

**S&W Petition**

Labor Code section 4553 provides for increased compensation when the employee is injured by "reason of the serious and willful misconduct" of the employer or its representatives. The applicant alleges that, because he was tasked with weed whacking after he returned to work from temporary disability leave caused by weed-whacking, in part, the Employer and supervisors, Samuel Rosas and Rayvon Williams, caused him injury by reason of their serious and willful misconduct.

While at work on 4/26/22, the applicant's back was injured while weed whacking, with an aggravation on 5/3/22 caused by other job duties. When the applicant returned from temporary disability, around 6/10/22, he was not restricted from weed whacking by his treater. The only work restrictions at that time were "No lifting, pulling or pushing over 45 lbs." The City of Watsonville provided a two-page form for the treater to address restrictions for the specific job duties of an AOS, which is attached to the work status report returning Applicant to work. In response to the question of whether the applicant could perform weed-whacking duty, the treater marked "yes." (DEFT'S EX. D-4: Work status report, Eric Jackson-Scott, M.D., 6/7/22.)

The Supreme Court in *Mercer-Fraser Co. v. Industrial Acci. Com.* (1953) 18 Cal. Comp. Cases 3, 11), elaborated on what serious and willful misconduct entails. The Court stated,

> Wilful [sic] 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.
>
> *Wilfulness [sic] necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences.* (Emphasis added.)
>
> "Wilful [sic] misconduct" means something different from and more than negligence, however gross. The term "serious and wilful [sic] 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 [sic] 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 [sic] misconduct. It amounts only to simple negligence. *To constitute "wilful [sic] 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. . .*(Emphasis added.)

Apparently, Applicant is not alleging that the original injury on 4/26/22 resulting from weed whacking was caused by the employer's serious and willful misconduct. (The S&W Petition was filed only in the 5/3/22 injury.) Furthermore, there is no evidence that the Employer assigned the applicant to weed whacking with the intention or wanton disregard of causing serious injury either before or after his back injury. Weed whacking was one of Applicant's job duties. The Employer and its representatives followed the work restrictions provided by the applicant's treater after he returned to modified duty. Moreover, there has been no showing that the applicant was actually injured, seriously or otherwise, because of any weed whacking performed after he returned to work. The applicant has failed to meet his burden of proof on this issue.

## IV

## RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

**ROISILIN RILEY**
**Workers' Compensation Judge**

**TRANSMITTED TO RECON UNIT ON THE SAME DATE SERVED.**

**SERVED:** 2/3/2025

On parties as shown on the
Official Address Record.