WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AURORA MUNOZ , *Applicant*

vs.

FIRST GROUP AMERICA; NEW HAMPSHIRE INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ10173387; ADJ19907358; ADJ3052978 (SDO 0310973); ADJ3882676 (SDO 0346117); ADJ4063239 (SDO 0311954); ADJ4429907 (SDO 0319903); ADJ883851 (SDO 0284206); ADJ8926536
Van Nuys District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award Re: Claim of Serious and Willful Misconduct February 26, 2025, issued in case number ADJ10173387 wherein it was found that "Applicant was not injured by reason of any serious and willful misconduct of the employer defendant" and that "Applicant is not entitled to a presumption of serious and willful misconduct based on defendants' failure to respond to written discovery." The WCJ thus ordered that "applicant's petition for increase of benefits under California Labor Code section 4553 for alleged serious and willful misconduct of the employer is denied." Previously, in this matter, in a Findings and Award of May 25, 2023, it was found that, while employed on August 30, 2015 as a bus driver, applicant sustained industrial injury to her shoulders, cervical spine and lumbar spine causing temporary disability from August 31, 2015 to July 26, 2017 and permanent disability of 35%.[1]

Applicant contends that the WCJ erred in not finding her entitled to increased "serious and willful" benefits pursuant to Labor Code section 4553. We have received an Answer from the employer defendant and a WCJ has filed a Report and Recommendation on Petition for

[1] Applicant sought reconsideration of the May 25, 2023 decision which was denied by an Opinion and Order Denying Petition for Reconsideration of August 15, 2023. Deputy Commissioner Anne Schmitz who was on the panel denying applicant's previous Petition for Reconsideration is not available to participate in the instant proceedings. Commissioner Joseph V. Capurro has been substituted in her place.

Reconsideration (Report). The WCJ who issued the Findings no longer works at the Van Nuys District Office, and thus another WCJ penned the Report.

Preliminarily, we note that 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 July 23, 2025 and 60 days from the date of transmission is Sunday, September 21, 2025. The next business day that is 60 days from the date of transmission is Monday, September 22, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on September 22, 2025, so 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

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

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 July 23, 2025, and the case was transmitted to the Appeals Board on July 23, 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 July 23, 2025.

Turning to the merits, for the reasons stated by the original WCJ in his Opinion on Decision and for the reasons stated by the new WCJ in the Report, which we adopt, incorporate, and quote below, we will deny reconsideration.

The Opinion on Decision is as follows:

OPINION ON DECISION

> At trial on November 7, 2024, the parties stipulated verbatim to the first finding of fact, that Aurora Munoz, [age 58 on the date of injury] while employed on August 30, 2015, as a Bus Driver, at San Diego, California, by Recess Holdings/First Group, sustained injury arising out of and occurring in the course of employment to cervical spine, thoracic spine, back, lower extremities, and shoulders (MOH/SOE 11/7/2024, p. 2, l. 5-8).
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> The sole issue submitted for decision is whether the employer defendant is liability for increased benefits due to serious and willful misconduct under Labor Code section 4553, with some elaboration in the form of "sub-issues" that are in fact not issues in and of themselves, but rather assertions of the parties pertaining to the serious and willful issue (*Id.*, pp. 2-3).
>
> The second finding of fact, that applicant was not injured by reason of any serious and willful misconduct of the employer defendant, Recess Holdings/First Group, is based on the vehicle inspection report admitted without objection as Defendant's Exhibit II, and applicant's testimony describing that report and her inspection and use of the vehicle that she was driving on the morning of her awarded work injury of August 30, 2015. According to the report, although there was an electrical short in the vehicle the previous day, the mechanic had said the vehicle was "OK TO DRIVE." Applicant and her employer were both equally justified in relying upon this representation in the report in assuming that the vehicle was safe to operate. This assumption proved

to be consistent with applicant's inspection of the vehicle and the first two times that she used the passenger lift on the morning of her injury, when she was injured while trying to hold down a passenger lift that started rising with the front wheels of a passenger's wheelchair on it, and/or while trying to lift the passenger after he had been flipped over by the lift, as described in applicant's testimony at trial on November 7, 2024 and February 4, 2025.

California Labor Code section 4553 reads 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.

Under Labor Code section 3202.5, any party asserting an issue has the evidentiary burden of proof on that issue. In this case, it was applicant's burden to show by a preponderance of the evidence that the serious and willful misconduct of her employer, or its managing representative, caused her injury of August 30, 2015. That burden was not met.

Specifically, serious and willful misconduct under Labor Code section 4553 requires showing of a willful, or intentional, act or failure to act by the employer, with knowledge that serious injury will be the probable result (*Industrial Constructors, Inc. v. Workers' Comp. Appeals Bd. (Yeager)* (1993) 58 Cal. Comp. Cases 90 (writ denied)). "Serious" generally refers not solely to the employer's conduct but also to the danger and its consequences, and in this case there was certainly serious harm to the employee that was foreseeable if a passenger lift malfunctioned. However, the "willful" requirement was not met. The employer must be aware of the danger, or turn a blind eye to it, and while the vehicle inspection report certainly put the employer on notice that there had been an electrical short in the vehicle operated by applicant the day before she used it, the report also indicated that the condition had been inspected by a mechanic and the vehicle was "OK" (Vehicle Inspection Report 8/29/2025, Defendant's II, p. 1). Thus, the employer was justified in assuming, as applicant did herself, that the vehicle was "OK."

As far as the state of mind that must be shown to obtain an increase of benefits under Labor Code section 4553, the California Supreme Court has held that

negligence, or even gross negligence, is not enough to constitute serious and willful misconduct under Labor Code Section 4553 (*Mercer-Fraser Co. v. Ind. Acc. Com.* (1953) 40 Cal. 2d 102, 120 [18 Cal. Comp. Cases 3, 251 P.2d 955]). Under section 4553, serious and willful misconduct means an act or decision not to act that is deliberate and for the express purpose of injuring another, or intentionally performed either with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless, and absolute disregard of its possibly damaging consequences (*Mercer-Fraser*, cited *supra*, at 120; *Hawaiian Pineapple Co. v. Ind. Acc. Com.* (1953) 40 Cal. 2d 656, 662 [18 Cal. Comp. Cases 94, 255 P.2d 431]). This means that the employer must know of the dangerous condition, know that the probable consequences of its continuance will involve serious injury to the employee, and 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, 882–883]).

In this case, the employer was justified in relying upon the inspection of its mechanic as indicated in the vehicle inspection report, and accordingly did not know any more than applicant did that the condition was dangerous, and did not know that the probable consequences of inaction would be serious injury to applicant. While the nature and manner of applicant's injury is highly unfortunate, it would be unreasonable to hold that the management of Recess Holdings/First Group knew or should have known that the injury was likely to happen. Such a finding would impose upon the employer an unreasonable duty of care to disbelieve the opinions of its mechanic regarding the safety of the vehicle after it was inspected for an electrical short. Given the representation that the vehicle was "OK," it was reasonable to allow applicant to operate the vehicle and its passenger lift. Indeed, applicant herself came to the same reasonable conclusion on the morning of her injury, after inspecting both the report and the vehicle.

With respect to applicant's request for an adverse inference because defendants did not respond to written requests for production, making such an assumption contrary to available, persuasive, and seemingly sufficient evidence would be contrary to the goal of the workers' compensation system to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character" (Cal. State Constitution, Art. XIV, § 4). Further, as a general rule, the procedural provisions of the Code of Civil Procedure relating to written discovery are not applicable in workers' compensation proceedings (See, e.g., *Brewer v. Ind. Acc. Com.* (1964) (writ denied), 29 Cal. Comp. Cases 3), for the reason that compelling a formal response would permit a "paper war" and frequent discovery motions, as eloquently explained by former Appeals Board Commissioner Merv Glow in *Hardesty v. McCord & Holdren, Inc.* (1976) 41 Cal.Comp.Cases 111, 113 [Appeals Bd. panel]).

The available facts in this case, including the vehicle inspection report from the

day immediately before the date of injury, and applicant's trial testimony explaining how she reviewed that information prior to using he vehicle, suggest that there is no contrary evidence that would be found by further developing the record. While it is disturbing that the employer had asked applicant to destroy records including the vehicle inspection report, that document has turned out to be more exculpatory than incriminating for the employer, because it indicates that the vehicle's electrical problem had been shown to a mechanic the previous day, and the mechanic found nothing wrong. There is no reason to suppose the mechanical inspection was negligent, because according to applicant's testimony, the vehicle and lift functioned normally multiple times before malfunctioning on the morning of applicant's injury (MOH/SOE 2/4/2025, p. 4, l. 21-25).

Accordingly, it is found that applicant is not entitled to a presumption of serious and willful misconduct based on defendants' failure to respond to written discovery, nor is she entitled to a finding of serious and willful misconduct of the employer based on the record at trial. This in no way diminishes the fact that applicant was injured on August 30, 2015, and, under California's no-fault system of workers' compensation, she is entitled to her previously-issued award of regular benefits. However, it is found that that this injury does not appear to be the result of any serious and willful misconduct of the employer.

The Report is as follows:

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

In light of the retirement [from the Van Nuys District Office] of WCJ Feddersen, the Presiding Judge of the Van Nuys Office has design[at]ed the undersigned to respond to the Petition for Reconsideration herein.

I. INTRODUCTION

The Applicant is a 58-year-old [at the time of injury] bus driver for the Defendant who sustained an admitted injury on August 30, 2015. The Petitioner is the Applicant who has filed a timely and verified Petition for Reconsideration claiming that WCJ Feddersen erred by finding that the injury was not proximately caused by the serious and willful misconduct of the employer.

The undersigned will recommend that the Petition be denied.

II. STATEMENT OF FACTS

This case involves the Petition for Serious & Willful misconduct of the employer on file herein.

The Applicant is a bus driver who is certified to drive medically disabled patients to and from their destinations. On 8/30/2015 she was "loading" a wheelchair bound patient onto the electric lift at the rear of her vehicle when apparently the lift suddenly began to rise while the patient was only partially on the lift. The patient in the wheelchair fell off the lift and capsized. In order to prevent this accident, the Applicant applied her body weight on the lift in hopes it would stop the lift, which it did not. By this effort she was injured.

Applicant was temporarily disabled for two years thereafter. A Findings and Award was issued on 5/30/2023 for 35% permanent disability. Reconsideration was denied on 8/15/2023.

The S&W Petition was heard initially on 11/7/2024 and ultimately submitted for decision on 2/4/2025 without further testimony.

The documentary evidence revealed a Vehicle Inspection Report filled out by the driver of the same vehicle the day before the accident (Ex. II). The report was admitted into evidence without objection. It was also established that each driver would inspect their vehicles before and after each day (Minutes of Hearing, 11/7/2024, p.4). This inspection from the day before the accident included the lift. The report states:

"Electrical Short in housing of lift. Mechanics say OK to drive."

The Applicant admits to inspecting the lift on the date of injury and finding no problems.

The initial use of the lift on the date of injury also revealed that it operated normally (Minutes of Hearing, 11/7/2024, p.5).

The Applicant filled out a Vehicle Inspection Report on the date of injury as well. At the top she indicates that the "Passenger Lift" was operational (Ex. 33). She checked it off the list.

Based upon this evidence and Applicant's testimony the WCJ denied the petition.

III. DISCUSSION

Cal. Lab. Code sec. 4553 reads:

> "The amount of compensation otherwise recoverable shall be increase 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 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."

Serious and willful misconduct under sec. 4553 specifically requires a showing of a willful or intentional act or failure to act by the employer with actual knowledge that serious injury will be the probable result. *Industrial Constructors, Inc. v. WCAB (Yeager)* (1993) 58 CCC 90, *writ denied*. The burden of proof on Applicant goes beyond simple negligence or even gross negligence. It requires actual knowledge and an intentional decision to not act with knowledge that the risk of serious injury will likely occur. It is in essence a form of quasi-criminal behavior. *Mercer-Fraser Co. v. IAC* (1953) 40 Cal.2d 102, 18 CCC 3.

First of all, Applicant must show that the alleged misconduct was performed by one of the persons named in sec. 4553. In this case the only individuals who may have known of the potential risk herein were the driver from the previous day who filled out the Vehicle Inspection Form on 8/29/2015 and a mechanic who informed the driver that the vehicle was safe to drive. Applicant did not identify nor prove the existence of anyone in a supervisorial role who may have been aware of the alleged risk. *Bigge Crane & Rigging Co. v. WCAB (Hunt)* (2010) 188 Cal. App. 4th 1330, 75 CCC 1089.

However, the Vehicle Inspection Report certainly did record the electrical short in the lift mechanism, and it is assumed that this report was given to someone. The risk had been published without doubt in Ex. II. But the fact remains that there is no evidence that anyone in a supervisorial role under sec. 4553 was informed of the risk.

Next the employee must prove that with that knowledge of serious risk the employer then put his or her mind to the problem, and with that knowledge deliberately did nothing.

Ex. II shows that a mechanic either inspected or repaired the vehicle. Whoever that mechanic was, it is established that someone in the defendant's employ put their mind to the report of trouble and took some form of action in response.

The Applicant then relied on that information along with the Applicant's own personal inspection of the lift and continued to work.
So the evidence reveals that an unknown individual of the employer such as a mechanic or mechanic supervisor took affirmative action in response to the notice of possible risk. If the employer responds to a report of substantial risk

and takes steps to rectify the problem, then the employer cannot be held liable under sec. 4553. *Elk Horn USD v. WCAB (Stroth)* (2007) 72 CCC 399.

In order to be serious and willful misconduct the employer must know the serious risk and with such knowledge allow the employee or instruct the employee to work under the known risk of serious injury. *MacKenzie Electric, Inc. v. WCAB (Williams)* (2023) 88 CCC 605, *writ denied*.

But it is necessary to show that the employer put his or her mind directly into the problem and did nothing. *Keely v. IAC (Henry)* (1961) 26 CCC 15; *Hawaiian Pineapple Co. Ltd. v. IAC (Churchill)* (1953) 40 C 2d. 656, 18 CCC 94.

In this case, the admitted evidence shows that some action was taken in response to the report of an electrical short. Based on that action, communication was made by a mechanic that the vehicle was safe which matched the observations of the Applicant before the accident occurred.

Petitioner also claims that an alleged failure to produce documents creates a presumption of a negative inference caused by that failure.

In *Hardesty v. McCord & Holdren* (1976) 41 CCC 111 the Appeals Board took the position that discovery issues can be handled most efficiently by the WCJ by determining pre-trial petitions in conference or even trial without resorting to voluminous and time consuming court proceedings that dominate civil practice. In *Commander v. Union Oil Co.* (1980) 45 CCC 1048 the Appeals Board indicated that discovery issues should be determined at a pre-trial conference.

A review of the record shows no such issue being raised or determined at the MSC conducted on 7/3/2024 (EAMS # 78195718). In *Commander,* the Appeals Board indicated that a discovery motion (or petition) should not only describe the information sought in discovery, but it must also state the response from the other party and give an opportunity for objection. If there is an objection, then a hearing should take place. None of this procedure was followed nor sought.

In addition, there is no statutory law or case law that raises such a presumption as the Petitioner suggests.

Based thereon, there is no basis to impose any type of presumption upon the evidence herein.

IV. RECOMMENDATION ON PETITION FOR RECONSIDERATION

Based upon the facts and law set forth above, it is respectfully recommended that the Petition for Reconsideration be DENIED.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Award Re: Claim of Serious and Willful Misconduct in case ADJ10173387 February 26, 2025 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 22, 2025

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

AURORA MUNOZ
LAW OFFICE OF RON NOLAN
MULLEN & FILIPPI
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK
ALBERT AND MACKENZIE

DW/oo

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