WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DARREL LINK, *Applicant*

vs.

NORTHROP GRUMMAN SYSTEMS CORPORATION; AIU INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Numbers: ADJ16034617; ADJ13224263; ADJ9403331
Van Nuys 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.

I.

Former Labor Code[1] 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, 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.

[1] All further references are to the Labor Code unless otherwise noted.

> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under 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 November 19, 2024, and 60 days from the date of transmission is Saturday, January 18, 2025. The next business day that is 60 days from the date of transmission is Tuesday, January 21, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on January 21, 2025, so that we have timely acted on the petition as required by section 5909(a).

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. 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 November 19, 2024, and the case was transmitted to the Appeals Board on November 19, 2024. 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 19, 2024.

[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.

II.

An applicant's right to recover workers' compensation benefits is subject to the conditions set forth in section 3600. Among these is that "the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee." (Lab. Code, § 3600(a)(4).) Intoxication is an affirmative defense, and the burden of proof rests on the employer, as the defendant, to establish that affirmative defense. (Lab. Code, § 5705(b).) To carry its burden of proof, a defendant is required to prove each fact supporting its claim by a preponderance of the evidence. (Lab. Code, § 3202.5.) As explained in section 3202.5:

> "Preponderance of the evidence" means that evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.

When a defendant asserts the intoxication defense, it must prove not only that the injured employee was intoxicated at the time of the injury, but also that the employee's intoxication was a proximate or substantial cause of the injury. (*Smith v. Workers' Comp. Appeals Bd.* (*Smith*) (1981) 123 Cal.App.3d 763, 774 [46 Cal.Comp.Cases 1053]; *Douglas Aircraft, Inc. v. Industrial Acc. Com.* (*MacDowell*) (1957) 47 Cal.2d 903 [22 Cal.Comp.Cases 24], disapproved on another ground in *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 636 [35 Cal.Comp.Cases 16].)

Here, we agree with the WCJ that defendant has not met its burden of proving applicant's intoxication at the time of the injury. (Report, at p. 4.) Blood alcohol testing is often used as evidence relevant to the issue of alcohol intoxication. (See, e.g. *Smith v. Workers' Comp. Appeals Bd., supra,* 123 Cal.App.3d 763; *Republic Indemnity Co. of America v. Workers' Comp. Appeals Bd.* (*Dickens*) (1982) 138 Cal.App.3d 42 [47 Cal.Comp.Cases 1382] (*Dickens*).) While blood alcohol testing results are not *conclusive* evidence of intoxication and must be weighed with all other evidence in the record, the presence of alcohol in blood testing is often presented as evidence relevant to the issue of intoxication. (*Smith, supra,* 123 Cal.App.3d at p. 774.)

Here, however, defendant offers no evidence of elevated blood alcohol levels. The only serum toxicology testing in evidence was performed at the Antelope Valley Hospital at 2:03 PM on the day of the injury and was interpreted as negative for ethanol. (Ex. 4, Records of Antelope Valley Medical Center, dated March 17, 2022, at p. 55.) Defendant offers no expert medical

testimony addressing the issue of whether applicant was intoxicated on the date of injury based on a review of records, clinical examination or other medical evidence. (See, e.g., *Dickens, supra,* 138 Cal.App.3d 42; *Mintz v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 283 [1996 Cal. Wrk. Comp. LEXIS 3060] (writ denied).) The Emergency Medical Transport records contained in the records of Antelope Valley Hospital reflect no reported "alcohol/drug indicators." (Ex. 4, Records of Antelope Valley Medical Center, dated March 17, 2022, at p. 80.) And none of the treatment records at Antelope Valley Medical Center reflect a physician's opinion that alcohol was a contributing factor in applicant's injury. Defendant offers no competent scientific or medical evidence of any nature establishing intoxication on the date of injury.

Defendant interposes no witness testimony to establish that applicant consumed alcohol on the date of injury. Nor does defendant offer witness testimony establishing that applicant exhibited the symptoms of intoxication, such as altered gait or slurred speech. (See, e.g., *Eastridge v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 117 [1995 Cal. Wrk. Comp. LEXIS 3479] (writ denied).) In short, defendant offers no relevant witness testimony concerning applicant's appearance or job performance on the date of injury. Based on the foregoing, we conclude that defendant has failed to offer any contemporaneous evidence of intoxication of any nature.

In the absence of any scientific, medical, or other evidence establishing that applicant was intoxicated at the time of the injury, and in the absence contemporaneous eyewitness testimony, defendant argues that applicant's "intoxication and alcoholism" were a substantial factor in his industrial injury. (Petition, at p. 6:15.) However, this formulation conflates evidence that applicant was intoxicated at the time of the injury which satisfies one of the requirements for an intoxication defense, with the assertion that applicant consumed alcohol on a daily basis, which does not.

Defendant cites the QME reporting of Dr. Richman as showing that applicant demonstrated a pattern of frequent drinking to excess. (*Id.* at p. 7:10.) Defendant avers the evidentiary record establishes applicant's frequent consumption of alcohol, including applicant's testimony at deposition, as well as applicant's medical history as described in the records of Antelope Valley Hospital. (*Id.* at p. 6:18.) Defendant points to this evidence as establishing a pattern of conduct. (*Id.* at p. 9:14.) Defendant asserts that applicant's pattern of nighttime drinking and his admission that he drank the night before the date of injury compels the conclusion that applicant was intoxicated when he reported for work on March 17, 2022. (*Id.* at p. 10:5.)

Although our analysis in this instance is not constrained by common-law or statutory rules of evidence (see Lab. Code, § 5708), we note that under Evidence Code section 1105, evidence of "habit and custom" is generally admissible to establish "conduct on a specified occasion in conformity with the habit or custom." (Evid. Code, § 1105.) However, even assuming that applicant consumed alcohol on the evening before the day of the accident, the record does not establish that applicant became intoxicated, or that he remained intoxicated hours later at the time of the injury.[3] Applicant testified his shift began at approximately 4:30AM, more than five hours prior to the industrial injury. (Minutes, at p. 6:24.) The Emergency Medical Response records indicate that a call was received for an ambulance at 10:01 AM on March 17, 2022, shortly after applicant fell from the scaffold. (Ex. 4, Records of Antelope Valley Medical Center, dated March 17, 2022, at p. 80.) Thus, applicant was at work for more than five hours before sustaining industrial injury. In addition, applicant's job location strictly prohibited the possession of any alcoholic beverages of any nature, the military police were permitted to inspect the employees at the job site, and if intoxication was suspected, the employees were subject to urine testing. (*Id.* at p. 6:8.) Notwithstanding these testing protocols and the ability to call co-workers or other percipient witnesses to testify, defendant offered no witness testimony at trial. Nor does defendant offer any competent theory as to how applicant was able to consume alcohol after arriving at work in a highly secure environment.

Thus, defendant has failed to offer any evidence that applicant ingested alcohol on the date of injury, or that applicant was intoxicated. Rather, the evidentiary record in the form of toxicology testing and applicant's trial testimony *affirmatively disproves* the intoxication defense.

Defendant's affirmative burden further requires that it establish intoxication as a proximate or substantial cause of the injury. (*Smith, supra*, 123 Cal.App.3d 763, 774.) And in this regard, we also agree with the WCJ that defendant has not met its burden. The WCJ's Report observes:

> [T]here is no evidence that alcohol use is the proximate cause of the injury. In fact the cause of his fall is essentially unknown. The mere observation by Dr. Richman that the Applicant may very well be an alcoholic does not prove causation especially when the evidence observed by Dr. Richman was surveillance film taken months later. In his actual exam of the patient he did not

[3] It is for this reason that in criminal law, a defendant's mere consumption of drugs or alcohol before the commission of a crime is generally insufficient to warrant an instruction on diminished capacity. (*People v. Miranda* (1987) 44 Cal.3d 57, 89 [241 Cal.Rptr. 594, 744 P.2d 1127].)

> note any abnormalities that would be characterized as caused by chronic alcoholism.

(Report, at p. 4.)

We again observe that defendant has interposed no eyewitness testimony or other account of the mechanics of applicant's fall from the scaffold. Nor does defendant offer a medical opinion linking applicant's fall with intoxication. And in the absence of evidence of concurrent intoxication, it is unclear how defendant would establish that intoxication was a proximate cause or contributed to applicant's fall from the scaffold. (See, e.g., *Douglas Aircraft, Inc. v. Industrial Acci. Com.* (1957) 47 Cal.2d 903 [22 Cal.Comp.Cases 24, 25].) We therefore conclude that defendant has not met its burden of establishing that applicant's intoxication was a proximate cause of his injury.

In summary, the record does not disclose any evidence that applicant consumed alcohol on the date of injury, either on the morning of the injury or while at work. The only toxicology testing in the record is negative for intoxicating substances. None of the responding emergency medical technicians or hospital personnel indicated any suspicion that applicant was intoxicated. Defendant offers no medical evidence to establish that applicant's consumption of beer the night before the injury was sufficient to result in intoxication the next day, or that applicant consumed alcohol during the five hours he was regularly working in a high security environment.

The absence of probative evidence of intoxication necessarily precludes defendant's ability to establish that intoxication was a proximate or contributing cause to his injury. Notwithstanding the complete lack of persuasive evidence of intoxication, the record reveals no evidence linking intoxication to applicant's injury, or indeed, any evidence of any nature regarding the mechanism of injury.

Because defendant has neither established that applicant was intoxicated at the time of the injury, nor that intoxication was a proximate cause of the injury, we affirm the WCJ's determination that defendant did not meet its affirmative burden of proof under section 3600(a)(4).

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I DISSENT (See separate opinion)

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 21, 2025

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

DARREL LINK
LAW OFFICE OF ARASH KHORSANDI
LAW OFFICES OF BLACK AND ROSE

SAR/abs

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

DISSENTING OPINION OF COMMISSIONER RAZO

I agree with my colleagues that section 3600(a)(4) excludes from compensability those injuries that result from intoxication, and that section 5705 places the burden of proof on a defendant to show that the intoxication was a material element or substantial factor in bringing about the injury. (*Douglas Aircraft v. Industrial Acc. Com.* (*MacDowell*) (1957) 47 Cal.2d 903 [22 Cal.Comp.Cases 24]; *Smith v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 763 [46 Cal.Comp.Cases 1053].) I dissent from my colleagues' conclusions, however, because I believe defendant has met that burden with clear and convincing evidence that applicant's injury was the result of his drinking to the point of intoxication prior to reporting for work.

Applicant has admitted to daily consumption of alcohol. (Minutes, at p. 6:20; 7:24.) The record reflects a 2019 episode in which applicant fractured his foot after he felt dizzy and "passed out." (Ex. C, Report of Antelope Valley Hospital, dated June 20, 2019, p. 662.) At the time, applicant was noted to drink as many as 10 beers each night. (Ex. 4, Records of Antelope Valley Medical Center, dated March 17, 2022, at p. 72.) Upon admission to the hospital, applicant reported that "his fall may have been precipitated by him drinking." (*Ibid*.)

Applicant testified in the current matter that he drank on a nightly basis prior to his injury, and that it takes five to six beers to feel intoxicated. (Minutes, at p. 7:24.) Applicant had no recollection of why or how he fell from the scaffold at work, only that he awoke on the ground. (*Id.* at p. 7:5.)

When applicant was transported to the hospital, he again reported that he regularly consumed 6-10 beers each night. (Ex. 4, Records of Antelope Valley Medical Center, dated March 17, 2022, at p. 72.) Following a review of sub rosa video taken of applicant, Qualified Medical Evaluator (QME) Dr. Richman concluded that applicant "drinks on a frequent basis," to the point it interferes with applicant's cognition and gait. (Ex. N, Report of Lawrence Richman, M.D., dated August 29, 2024, at p. 3.)

Here, the applicant's nightly drinking to the point of intoxication cannot be disregarded as an insubstantial factor in causing his fall from the scaffold. There is no evidence that applicant's fall involved any external trauma or force, applicant testified that his nightly consumption of beer was sufficient to cause intoxication, and the testimony of Dr. Richman established that in the sub rosa video he reviewed, applicant's cognition and gait were impaired as a result of his drinking.

The Appeals Board is empowered on reconsideration to resolve conflicts in the evidence, to make its own credibility determinations, and to reject the findings of the WCJ and enter its own findings on the basis of its review of the record. (*Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 908 [55 Cal.Comp.Cases 196].) Here, the discrepancies between applicant's statements recorded in the medical record, his deposition testimony, and his testimony at trial, coupled with his refusal to cooperate with valid discovery efforts (see Petition, at p. 2:21) lead me to conclude that applicant is not a credible witness.

Defendant's evidentiary burden herein requires that we assess whether the evidence "has more convincing force and the greater probability of truth". (Lab. Code, § 3202.5.) Based upon applicant's own testimony at trial, a history of alcohol-related falls, evidence of nightly drinking, a dearth of collateral evidence as to how or why applicant fell from the scaffold, and medical opinion that when applicant drinks to intoxication he suffers from altered gait and cognitive impairment, I am persuaded that defendant has met its burden of showing that it was more likely than not that applicant's alcohol intoxication was a material and substantial factor in bringing about his injury.

Because I conclude that intoxication was a material element or substantial factor in bringing about the injury claimed herein, I would rescind the F&O and substitute findings of fact that compensation is barred pursuant to Labor Code section 3600(a)(4).

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 21, 2025

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

DARREL LINK
LAW OFFICE OF ARASH KHORSANDI
LAW OFFICES OF BLACK AND ROSE

SAR/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

The injured employee is a 53-year-old airplane mechanic who sustained an injury at work for the Defendant on 3/17/2022.

The Petitioner is the Defendant who has filed a timely and verified Petition for Reconsideration claiming that the undersigned erred by failing to find that Applicant's injury was proximately caused by Applicant's intoxication under Cal. Lab. Code sec. 3600(a)(4). The undersigned shall recommend that the Petition be denied.

II. STATEMENT OF FACTS

As an aircraft mechanic the Applicant was working on the date of injury upon a scaffolding underneath a jet engine upon which he was working. He fell backwards and does not know why. He fell approximately five feet sustaining among other things his head and left arm. His first memory is that he was being put on a backboard or gurney. He has not worked since.

The injury was initially accepted by the Defendant and temporary disability was paid for the period 3/18/2022 through 1/8/2024 at which time the claim was denied. The Defendant then raised the issue of intoxication under Cal. Lab. Code sec. 3600(a)(4).

Trial took place on 10/16/2024 solely on the issue of the intoxication defense.

Applicant's testimony is that he was not drinking at work and that alcohol is strictly forbidden at the worksite. Inspections can take place. Mere possession of alcohol can result in discipline.

The Applicant has a history of daily alcohol intake specifically drinking beer. He suffered a fall at home in 2019 probably precipitated by beer intake (Ex. D). The best evidence is that his fall at home was syncope (Ex. B).

His regular nightly beer intake is estimated anywhere from six to fourteen beers (Ex. E). He admits in deposition (Ex. P) that in all likelihood he was drinking beer the night before this injury on 3/17/2022.

As far as he recalls there was a toxicology report at the time of injury because the employer requires it when there is a work-related injury. He believes the results were negative (Minutes of Hearing, 10/16/2024, p.7, line 7).

There was no testimony regarding the Applicant's behavior at the time of injury.

The records from Antelope Valley Hospital show that he was discharged and given generalized post-discharge instructions (Ex. 4). Under the diagnosis of "subarachnoid hemorrhage" they indicated that the cause can be a broken blood vessel in the brain and/or a blow to the head (the obvious cause herein). They did indicate that excessive alcohol intake can be a risk factor (p. 111). The toxicology tests done on 3/17 show no alcohol findings (p. 238).

App's Ex. 4 contains voluminous medical records from Antelope Valley Medical Center. The initial observation of the ambulance crew shows no notations consistent with intoxication (pp. 76 – 81). The intake blood work on the date of injury states:

"Serum toxicology (3/17/2022 2:03PM): Ethanol interp: Negative."(p.70)

This finding is repeated on p.102.

Also in the intake notes on 3/17/2022 at p.75 they note as part of the history:

"Memorial Intoxication or sedation: No."

Dr. Richman acted as a QME in neurology (Ex. N). He observed the surveillance films that were admitted into evidence (Ex. M). He expressed an opinion that the Applicant's gait in one film was characteristic of alcohol. The films were not taken on the date of the injury. And indeed Dr. Richman opined that in all likelihood Mr. Link is an alcoholic.

As a result of the trial the undersigned determined that the Defendant had not proven the case for the intoxication defense under Cal. Lab. Code sec. 3600(a)(4).

The issue of the presumption of compensability under Cal. Lab. Code sec. 5402(b) was not raised.

III. Discussion

Cal. Lab. Code sec. 3600(a) provides:

> "(a) Liability for the compensation provided by this division, in lieu of any other liability whosoever to any person except as otherwise specifically provided in sec. 3602 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in

> the course of the employment…in those cases where the following conditions of compensation concur:
>
> (4) Where the injury is not caused by the intoxication, by alcohol, or the unlawful use of a controlled substance, of the injured employee. …"

The defense is an affirmative defense upon the Defendant. The Defendant does not have to prove that intoxication is the *sole* cause of the injury, but they must prove that it is the proximate cause or substantial cause in order to satisfy the statute. *Smith v. WCAB* (1981) 123 Cal. App. 3d 763, 46 CCC 1053.

The Appeals Board has therefore set out a three-pronged test: (1) that the Applicant was consuming alcohol, (2) that in fact consumption of alcohol caused intoxication, and (3) the intoxication is the proximate cause of the injury. *Garcia v. Famarock* 2019 Cal. Wrk. Comp. P.D. LEXIS 99; *Pirelli Armstrong Tire Corp v. WCAB (Brinkley)* (1999) 64 CCC 1311, *writ denied.* Intoxication must be proved by medical evidence and not by mere speculation. *Barrett Business Services v. WCAB (Carrillo)* (2008) 73 CCC 133 *writ denied.*

The evidence is that the Applicant goes to work at approximately 4AM. There is no evidence that he was drinking alcohol on the date of injury. The accident occurred around 10AM. The ambulance team made no notation regarding alcohol (Ex. A). The toxicology tests at the hospital in the afternoon found no alcohol. Hence there is no evidence that Applicant was consuming alcohol at the time of the injury.

Similarly, there is no evidence that there was a state of intoxication. There were no witnesses describing unusual behavior contemporaneous to the injury that one might characterize as evidence of intoxication.

Lastly there is no evidence that alcohol use is the proximate cause of the injury. In fact the cause of his fall is essentially unknown. The mere observation by Dr. Richman that the Applicant may very well be an alcoholic does not prove causation especially when the evidence observed by Dr. Richman was surveillance film taken months later. In his actual exam of the patient he did not note any abnormalities that would be characterized as caused by chronic alcoholism.

One could in fact sustain an injury proximately caused by alcohol intake and intoxication due to long term chronic use affecting one's ability to control their activities at work. But such a proof would require expert medical evidence of which there is none herein.

Petitioner's claim that the ambulance crew knew Applicant had passed out from alcohol use is completely unsupported. The undersigned made no comment as to how the ambulance crew ought to have analyzed the situation (p. 8, lines 13 – 17).

Petitioner's claim that the Antelope Valley Hospital discharge notes blame alcohol as a causative factor in this injury is also incorrect. As stated above the notes on p.106 of Ex. 4 are a standard discharge paper given to anyone suffering a subarachnoid hemorrhage. So as to not "aggravate the condition" the patient should avoid excessive use of alcohol. This has nothing to do with the cause of MR. Link's fall at work.

Consequently the undersigned found that Defendant had failed to prove the affirmative defense of intoxication.

IV. RECOMMENDATION ON PETITION FOR RECONSIDERATION

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

DATE: 11/18/2024

Dean M. Stringfellow
Workers' Compensation
Administrative Law Judge