WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ENRIQUE AGUILAR, ***Applicant***

vs.

CALIFORNIA BIO-PRODUCTEX INC.;
STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Number: ADJ10718690
Fresno District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant California Bio-Productex, Inc. (defendant) seeks reconsideration of the November 15, 2024 Findings of Fact and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant was injured by reason of the serious and willful misconduct of the defendant.

Defendant contends that the evidence does not establish actual knowledge of the possible consequences of any alleged unsafe conditions on the part of the employer. Defendant further contends the WCJ's factual determinations as to the condition of the forklifts involved in the industrial accident are not substantiated in the record. Accordingly, defendant asserts that its actions did not rise to the level of serious and willful misconduct.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

FACTS

Applicant claimed injury to his back, bilateral shoulders, right lower extremity, right foot and trunk while employed as a dispatcher by defendant California Bio-Productex on November 18, 2016. Applicant alleged injury as a result of a forklift "roll over" accident. (Application for Adjudication of Claim, dated January 12, 2017.)

On July 14, 2017, applicant filed a Petition for Award of Increased Benefits for Employer's Serious and Willful Misconduct. Applicant alleged his injury arose out of forklifts in disrepair, and that "all three forklifts in use at the Crown facility had mechanical problems rendering them unsafe to use." (*Id.* at p. 2:25.) Applicant further alleged that management personnel were warned of the brakeless condition of the subject forklift on multiple occasions but failed to remediate the issue. (*Id.* at p. 3:7.) Applicant requested increased benefits pursuant to Labor Code[1] section 4553.

On February 9, 2022, a WCJ approved the parties' Compromise and Release Agreement, which resolved issues relating to the case in chief but did not resolve applicant's pending serious and willful misconduct petition.

On August 8, 2023, applicant filed an Amended Petition for Award of Increased Benefits for Employer's Serious and Willful Misconduct (S&W Petition).

On May 30, 2024, the parties proceeded to trial on the issue of applicant's S&W Petition, and the related issue of whether the claim for increased benefits was timely. The WCJ heard expert testimony from applicant witness Jim Flynn and continued the hearing for additional testimony.

On September 12, 2024, the WCJ heard testimony from Michael Kelly, a percipient witness to the November 18, 2016 forklift accident. The WCJ provided time to the parties for post-trial briefing, and ordered the matter submitted for decision as of September 26, 2024.

On November 15, 2024, the WCJ issued the F&A, determining in relevant part that "[t]he employer failed to provide a safe work environment because the applicant was operating a forklift that had nonfunctioning steering and brake mechanisms." (Finding of Fact No. 2.) The WCJ further determined that "[t]he employer knew that the forklift was nonfunctional yet allowed the applicant to be placed in a dangerous position likely to be injured," and that "[t]he forklift towing applicant's forklift had brakes that were unreliable." (Findings of Fact Nos. 3 and 4.) Accordingly, the WCJ awarded increased disability pursuant to section 4453, less attorney fees. (Award, Nos. 1 & 2.)

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

Defendant's Petition contends that its conduct did not rise to the level of "willful misconduct" as described in section 4453. Defendant avers that willful misconduct "requires an intentional act or an intentional failure to act, either with knowledge that serious injury is a probable result, or with a positive and active disregard for the consequences." (Petition, at p. 3:8.) Defendant contends that "the evidence did not establish actual knowledge of the possible consequences of any alleged unsafe conditions on the part of the employer," and that "the judge constructively 'charges' the employer with having knowledge of dangerous conditions and never addresses knowledge of consequences." (*Id.* at p. 7:1.) Defendant also maintains that knowledge of any danger cannot be imputed because there is no evidence of prior similar accidents. (*Id.* at p. 9:23.) Defendant also contends that the witness testimony establishes that the brakes on the functional forklift involved in the accident were operative, as was the steering on the nonfunctioning electric forklift that injured applicant. (*Id.* at p. 11:10.) Accordingly, defendant concludes that there was insufficient evidence to establish defendant's reckless disregard of evident safety concerns. Because the evidence "does not give rise to a breach of care any greater than mere negligence," defendant requests that we set aside the F&A. (*Id.* at p. 12:5.)

DISCUSSION

I.

Former 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.
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> (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 December 19, 2024 and 60 days from the date of transmission is Monday, February 17, 2025. The next business day that is 60 days from the date of transmission is Tuesday, February 18, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on February 18, 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 December 19, 2024, and the case was transmitted to the Appeals Board on December 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 December 19, 2024.

II.

Applicant alleges that he was injured as a result of the serious and willful misconduct of defendant. Section 4453 provides, in relevant part, that "[t]he 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 … [t]he employer, or his managing representative." (Lab. Code, § 4453(a).)

[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.

"An award for serious and wilful misconduct is 'of the nature of a penalty.' Such an award can be sustained only if the evidence establishes and the [WCAB] finds every fact essential to its imposition." (*Dowden v. Industrial. Acc. Com.* (1963) 223 Cal.App.2d 124, 129 [28 Cal.Comp.Cases 261], quoting *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d 102, 108 [18 Cal.Comp.Cases 3] (*Mercer-Fraser*).) "A claim of serious and wilful misconduct raises issues of law as well as of fact. Issues relating to the credibility of witnesses, the persuasiveness or weight of evidence, and the resolution of conflicting inferences are questions of fact. 'But as to what minimum factual elements must be proven in order to constitute serious and wilful misconduct, and the sufficiency of the evidence to that end, the questions are of law.'" (*Dowden, supra*, 28 Cal.Comp.Cases at p. 264, quoting *Mercer-Fraser, supra*, 40 Cal.2d at p. 115.)

Serious and willful misconduct is "'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.'" (*Mercer-Fraser, supra*, 40 Cal.2d at p. 117.) A finding that an employer is guilty of serious and willful misconduct in failing to act for employee safety must "be based on evidence that [the employer] deliberately failed to act for the safety of [its] employees, knowing that [its] failure would probably result in injury to them." (*Rogers Materials Co. v. Industrial Acc. Com.* (1965) 63 Cal.2d 717, 722 [30 Cal.Comp.Cases 421, 423].) Thus, in the context of an alleged failure to act for employee safety, an employer guilty of serious and willful misconduct must (1) know of the dangerous condition, (2) know that the probable consequences of its continuance will involve injury to an employee, and (3) deliberately fail to take corrective action. (*Johns-Manville Sales Corp. v. Workers' Comp. Appeals Bd.* (*Horenberger*) (1979) 96 Cal.App.3d 923, 933 [44 Cal.Comp.Cases 878] (*Horenberger*); *Dowden, supra*, 223 Cal.App.2d 28 Cal.Comp.Cases at p. 265.)

Here, the WCJ's Opinion on Decision observes that on the day of the industrial accident, defendant "instructed Mike Kelly, the applicant's supervisor, to move the disabled electric forklift from a warehouse on their California Bio-Productex, Inc. facility to the 'Boneyard,' an area approximately 300 yards away," and that "the employer knew the forklift being moved from the warehouse was 'unoperative.'"(Opinion on Decision, at p. 3, citing Exhibit I, Transcript of the Deposition of Loepold Wiezbicki, dated July 17, 2019, at p. 8:15-25.) The WCJ summarized the mechanism of injury as follows:

> The applicant sustained injury to his knee when he was thrown to the ground and continued to be dragged along the ground. The other forklift driver jumped off his forklift to try and render aid, but his forklift kept on moving and made contact with the applicants left rib. According to the applicant's testimony that forklift had no brakes. (Exhibit B, 48:18-23, 53:15-25, 54:1-25, 55:1-25, 57:1-19)

(Opinion on Decision, at p. 3.)

The WCJ's Opinion on Decision reviews the legal standard for serious and willful misconduct, as described in *Horenberger, supra,* 96 Cal.App.3d 923, and addresses the initial inquiry as to whether the employer knew of a dangerous condition as follows:

> The employer was aware that the forklift was nonfunctioning. It had no power, brakes or steering. The employer planned to have the applicant ride on top of the forklift as it was being towed by another forklift. The forklifts were connected by a tow [pin] and a chain. (Exhibit C, pg. 37:2-4) There was no way to stop the forklift and steering was difficult. The employer knew that the applicant had no control over the forklift. The applicant was instructed to ride on a nonfunctioning forklift while being towed from one area to another area of employer's facility 300 yards away. The forklift did not have brakes and the steering was at best difficult to operate. The applicant was also seated facing in the opposite direction of travel, so he could not see where he was going. According to applicant, the forklift he was on was nonoperational and could not turn in any way. (Exhibit N, Pg. 39, 1-14) The applicant was injured when it tipped over. He was thrown off the forklift and it landed on his leg.

(Opinion on Decision, at p. 5.)

With respect to the question of whether the employer knew that the "probable consequences of its continuance will involve injury to an employee," the WCJ observed that "an employer may be charged with knowledge of a dangerous condition when the nature of the danger is obvious," citing *Rogers Material Co. v. Indus. Acc. Comm.* (*Drake*) (1965) 63 Cal.2d 717 [30 Cal.Comp.Cases 421] (*Drake*)). And in answer to the question of whether the employer deliberately failed to take corrective action, the WCJ observed:

> The employer wanted to move the nonoperational forklift immediately. [Defendant] ordered Mr. Kelly to move the forklift from point A to point B. The applicant was placed in a position of danger. The applicant was riding on a forklift that had no brakes or steering. The steering difficulty was described as like driving a car where the steering belt goes out on a care making steering very difficult. (Exhibit C, L2-10) The employer's conduct is measured by whether he permits his employees to work by a dangerous method whether he orders them to perform a hazardous job. Keeley v. IAC (Henry), 26 CCC 15, (1961)

> The employee must also demonstrate that the injury is caused by the employer's serious and willful misconduct. The applicant's injury was directly caused by the employer's serious and willful misconduct because he placed the applicant in a clearly unsafe position. The applicant was riding on a vehicle that he was unable to control. The accident took place in an area of the road that was uneven and caused the forklift to tip and fall over.
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> Secondly, the forklift used to tow the forklift had faulty brakes. This fact was known to the employer based on testimony by Mike Kelly. A forklift identified as "Canary" was problematic because the brakes were unreliable, and they could never figure out what was wrong with the brakes. (Exhibit C, Pg. 28, L3-11) Despite that unreliability the employer continued to utilize that forklift. (Exhibit C, Pg. 29 L8-10)
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> Having the applicant ride on such a vehicle was dangerous the employer failed to act for the safety of its employees. The employer knew that applicant could not control the forklift he was riding and that the forklift used to tow also had unreliable brakes. The employer deliberately placed the applicant in a position of danger and no precautions undertaken to protect the applicant.

(Opinion on Decision, at p. 6.)

Defendant's Petition asserts there was no evidence establishing actual knowledge of the possible consequences of any alleged unsafe conditions on the part of the employer, and that the WCJ constructively charged the employer with such knowledge. (Petition, at p. 7:1.) However, the WCJ's Report observes that an employer may be charged with knowledge of a dangerous condition when the nature of the danger is obvious. In *Dowden, supra*, 223 Cal. App. 2d 124, the court discussed the tension between actual and imputed or constructive knowledge of peril in the evaluation of serious and willful misconduct. The *Dowden* court stated:

> The employer will not be heard to deny lessons of the past which all honest men will acknowledge. When he sends his employee into a position of danger which is apparent to others, he will not be permitted to escape liability by professing internal ignorance. Essentially, then, the problem is reduced to a consideration of the kind of evidence an astute and skeptical trier of fact will accept in measuring the employer's consciousness of danger. Circumstantial evidence may justify or even compel a finding of knowledge in the face of testimony avowing ignorance.

(*Id.* at p. 132.)

Here, the trier of fact has carefully analyzed the circumstances surrounding applicant's injury of November 18, 2016. The WCJ's Report observes:

> The employer knew that the applicant had no control over the forklift. The applicant was instructed to ride on a nonfunctioning forklift while being towed from one area to another area of employer's facility 300 yards away. The forklift did not have brakes and the steering was at best difficult to operate. The applicant was also seated facing in the opposite direction of travel, so he could not see where he was going.
>
> According to applicant, the forklift he was riding on was nonoperational and could not turn in any way. (Exhibit N, Pg. 39, 1-14) The applicant was injured when it tipped over. He was thrown off the forklift and it landed on his leg.

(Report, at pp. 3-4.)

Defendant's Petition further disputes the factual bases underlying the WCJ's conclusions. Defendant contends that the towing forklift had functional brakes based on the testimony of Mr. Kelly, who testified that "the brakes worked because he drove that forklift from the accident area away." (Petition, at p. 11:10.) Defendant also contends that the forklift being towed had functional steering because Mr. Kelly saw applicant turn the steering wheel in the warehouse. Mr. Kelly also testified that applicant moved his arms during the towing process in a way that represented movement of the steering wheel. (*Id.* at p. 11:16.)

The WCJ's Report observes, however, that he relied on the credible and undisputed testimony of Jim Flynn, applicant's safety expert, who testified that in his opinion the electric forklift could not be steered because the hydraulic fluid was not functioning, and that applicant would not be able to effectively steer it. (Report, at p. 5.) The WCJ's Report also notes Mr. Kelly's testimony that the brakes on the towing forklift were unreliable, that they could not figure out what was wrong with the brakes, and that the employees had informed the employer of the problem. (*Id.* at p. 6.)

When a WCJ's findings are supported by solid, credible evidence, they are to be accorded great weight by the Board and rejected only on the basis of contrary evidence of considerable substantiality. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) Here, we have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). (*Garza, supra,* at pp. 318-319.) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s). (*Id*.) Based on the WCJ's review of the entire record, as well as the WCJ's assessment of the credibility of the witnesses, we agree that the

employer deliberately failed to act for the safety of its employees, knowing that its failure would probably result in injury to them. (*Drake, supra*, 63 Cal.2d 717, 722.)

In summary, we agree with the WCJ that the employer knew of a dangerous condition involving forklifts with nonfunctional or intermittently functional brakes and steering but nonetheless directed applicant to participate in an ill-advised towing endeavor that resulted in applicant being injured when his forklift overturned. The record reflects that the employer failed to take corrective action in response to a known and dangerous situation, and that the harmful consequences of the failure to remediate were plainly evident. (*Horenberger, supra,* 96 Cal.App.3d 923, 933.) We further accord to the WCJ's credibility determinations the great weight to which they are entitled. (*Garza, supra*, 3 Cal.3d 312.) Because we discern no other evidence of considerable substantiality that would warrant rejecting the WCJ's findings, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 14, 2025

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

ENRIQUE AGUILAR
CHURCH LAW GROUP
STATE COMPENSATION INUSURANCE FUND

SAR/bp

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