

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**JAZMIN LUCERO, *Applicant***

**vs.**

**LIVING SPACES FURNITURE, LLC; ZENITH INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ19073561  
Riverside District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award (F&A) issued on December 13, 2024 wherein the workers' compensation administrative law judge (WCJ) found that applicant's claim for benefits was not barred by the initial aggressor defense under Labor Code<sup>1</sup> section 3600(a)(7) and that applicant, while employed by defendant as a truck driver on March 27, 2024, sustained an injury arising out of and in the course of her employment (AOE/COE).

Defendant contends that applicant abandoned her employment by pursuing a "third-party trucker with whom she had a personal vendetta" and "aggressively and intentionally" placing herself in danger. (Petition for Reconsideration (Petition), p. 8.) Defendant further contends that applicant's "actions and behaviors leading up to the incident" bar compensation under section 3600(a)(7) as applicant was the initial aggressor. (Petition, p. 12.)

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition and rescind and substitute the F&A to reflect, in relevant part, that applicant's claim is not barred by

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<sup>1</sup> All further references will be to the Labor Code unless otherwise indicated.

section 3600(a)(7); applicant sustained injury AOE/COE to the cervical and lumbar spine; and all other issues, including injury AOE/COE to other body parts, are deferred.

### **FACTS**

Applicant claimed that, while employed by defendant as a truck driver on March 27, 2024, she sustained an industrial injury to her cervical, thoracic, and lumbar spine, left arm, bilateral wrists and hands, left leg, and psyche. Applicant later amended the claim to include the left upper extremity, left lower extremity, left hip, sleep, stress, anxiety, headaches, neuro, internal, sexual dysfunction, and worsening of asthma.

The following day, on March 28, 2024, applicant was seen by Dr. Shaheen Zakaria at Concentra. In her Doctor's First Report of Occupational Injury Dr. Zakaria diagnosed applicant with cervical and lumbosacral strain and paraspinal muscle spasm as a result of the March 27, 2024 motor vehicle accident. (Applicant Exhibits 3 and 4.) As a part of the examination, Dr. Zakaria ordered x-rays of the cervical and lumbar spine. (Applicant Exhibits 5-6.)

On May 13, 2024, applicant was seen by Dr. Jonathan Nissanoff for an "Initial Complex Orthopedic Evaluation." (Applicant Exhibit 1.) Dr. Nissanoff diagnosed applicant with cervical radiculitis of the left arm, lumbar radiculitis of the left leg, left shoulder impingement, left elbow cubital tunnel syndrome, bilateral wrist carpal tunnel, and left ankle and knee derangement. He opined that applicant's symptoms were "causally related to the industrial injury" of March 27, 2024. (*Ibid.*)

On April 8, 2024, defendant issued a letter to applicant indicating that the claim was denied pursuant to the initial aggressor defense under section 3600(a)(7) and the fact that applicant engaged in "horseplay" at the time of the injury. (Joint Exhibit 1.)

On October 16, 2024, the parties proceeded to trial on the issue of whether applicant sustained injury AOE/COE and whether applicant's claim was barred under section 3600(a)(7).

On December 13, 2024, the WCJ issued an F&A holding, in relevant part, that applicant sustained an injury AOE/COE on March 27, 2024 while employed by defendant as a truck driver and that applicant's claim was not barred under section 3600(a)(7). No body parts were listed within the WCJ's findings regarding injury AOE/COE.

## DISCUSSION

### I.

Preliminarily, 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.
  - (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 under the Events tab 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 January 16, 2025, and 60 days from the date of transmission is March 17, 2025. This decision was issued by or on March 17, 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 constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on January 16, 2025, and the case was transmitted to the Appeals Board on January 16, 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 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 January 16, 2025.

## II.

Turning now to the merits of the Petition, it is well established that the employee bears the burden of proof in establishing injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.) Section 3600(a)(7), however, bars an employee's claim for compensation where the injury arises out of an altercation in which the injured employee is the initial physical aggressor. Since it is defendant here who claims this defense, it is defendant's burden to establish that applicant was in fact the initial physical aggressor. (Lab. Code, § 5705 ["burden of proof rests upon the party or lien claimant holding the affirmative of the issue"].)

The case of *Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 719 [37 Cal. Comp. Cases 124, 127-128] provides some guidance as to the applicability of the initial aggressor defense. In *Mathews*, the court held that section 3600(a)(7) bars recovery only when two conditions are present: first, the injury for which workmen's compensation benefits is sought must "arise out of an altercation," second, the injured employee must be the "initial physical aggressor" in that altercation. (*Mathews, supra*, at p. 127.) With respect to the first prong, an injury arises out of an altercation if it results from "an exchange between two or more persons characterized by an atmosphere of animosity and a willingness to inflict bodily harm." (*Ibid.*) With respect to the second prong, the court held that an initial physical aggressor is one who first engages in physical conduct which a reasonable man would perceive to be a "real, present and apparent threat of bodily harm . . . ." (*Mathews, supra*, at p. 128, citing *Briglia v. Industrial Accident Commission* (1962) 27 Cal.Comp.Cases 217, 218.)

In the instant case, defendant produced insufficient evidence to meet their burden. The other driver involved in the accident did not testify and the record does not include evidence of the other driver's state of mind. Further, we note that based upon the other driver's actions, as highlighted by the WCJ, the other driver appeared to be "securely traveling in the far left lane" before he "accelerated next to the Applicant before swerving into her truck and continuing to push her off the road and onto the shoulder." (Report, p. 6.) Based upon the evidence in the record, there

is therefore little proof to support defendant's argument that the accident occurred due to the other driver's "perceived threat of bodily harm." (Petition, p. 13.) We also underscore the fact that pursuant to *Mathews*, "section 3202 enjoins us to construe the workmen's compensation provisions of the Labor Code liberally 'with the purpose of extending their benefits for the protection of persons injured in the course of their employment.' Consequently, the provisions of section [3600(a)(7)] which deny compensation to persons so injured, must be narrowly and strictly construed." (*Mathews, supra*, at p. 127, citing *Fruehauf Corp. v. Workmen's Comp. App. Bd., (Stansbury)* (1968) 68 Cal. 2d 569, 577 [33 Cal.Comp.Cases 300].) To that end, we find that the initial aggressor defense under section 3600(a)(7) does not apply herein.

Defendant contends that applicant's actions at the time of injury "constitute a temporary abandonment" of employment which renders applicant's injury non-compensable. (Petition, p. 11.) We disagree. It is well established that "[w]here an employee is in the performance of the duties of his employer, the fact that the injury was sustained while performing the duty in an unauthorized manner or in violation of instructions or rules of his employer does not make the injury one incurred outside the scope of employment." (*Williams v. Workers' Comp. Appeals Bd.* (1974) 41 Cal.App.3d 937 [39 Cal.Comp.Cases 619, 621].) Further, California has a no-fault workers' compensation system. With few exceptions, all California employers are liable for the compensation provided by the system to employees injured or disabled in the course of and arising out of their employment, "irrespective of the fault of either party." (Cal. Const., art. XIV, § 4.) The protective goal of California's no-fault workers' compensation legislation is manifested "by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.'" (Lab. Code, §§ 3351, 5705(a); *S.G. Borello & Sons, Inc. v. Dept. of Ind. Relations (Borello)* (1989) 48 Cal.3d 341, 354 [54 Cal.Comp.Cases 80].) Lastly, notwithstanding defendant's arguments above, there is no dispute applicant was involved in the motor vehicle accident while driving her semi-truck trailer for work.

On a final note, we observe that in his December 13, 2024 F&A, the WCJ failed to list any body parts with respect to his finding of injury AOE/COE. Given that an AOE/COE finding without a body part creates confusion as to a defendant's obligations regarding the advancement of benefits, it is important that at least one body part is identified in a finding of injury. (Lab. Code, § 3600(a); *Clark, supra*, at pp. 291, 297–298.) Further, it is generally understood that "[a]wards of

the board ‘are subject to those general legal principles which circumscribe and regulate the judgments of all judicial tribunals.’ [Citations.] Accordingly, they must be sufficiently certain to permit enforcement...” (*Toccalino v. Workers’ Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 557 [47 Cal.Comp.Cases 145].)

Fortunately, we can turn to the medical evidence here. On March 28, 2024, applicant was seen by Dr. Shaheen Zakaria at Concentra, and in her Doctor’s First Report of Occupational Injury, Dr. Zakaria, upon an examination and completion of various diagnostics, and a taking of applicant’s history, diagnosed applicant with cervical and lumbosacral strain and paraspinal muscle spasm as a result of the March 27, 2024 motor vehicle accident. (Applicant Exhibits 3 and 4.) Based upon Dr. Zakaria’s reporting, we therefore find that applicant sustained injury AOE/COE to the cervical and lumbar spine.

Accordingly, we grant defendant’s Petition and rescind and substitute the F&A to reflect, in relevant part, that applicant’s claim is not barred by section 3600(a)(7); applicant sustained injury AOE/COE to the cervical and lumbar spine; and all other issues, including injury AOE/COE to other body parts, are deferred.

For the foregoing reasons,

**IT IS ORDERED** that defendant’s Petition for Reconsideration of the December 13, 2024 Findings and Award is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the December 13, 2024 Findings and Award is **RESCINDED** and the following **SUBSTITUTED** therefor:

#### **FINDINGS OF FACT**

1. Jazmin Lucero, born [], while employed on March 27, 2024 as a Truck Driver, occupational code number 350, at Perris, California, by Living Spaces Furniture, LLC, sustained an injury arising out of and in the course of employment to the cervical and lumbar spine.
2. At the time of the injury, the employer’s workers’ compensation insurance carrier was Zenith Insurance Company.

3. Applicant's claim is not barred by the initial aggressor defense under Labor Code Section 3600(a)(7).

**ORDER**

1. All other issues, including injury arising out of and in the course of employment to other body parts, are deferred.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**ANNE SCHMITZ, DEPUTY COMMISSIONER**  
**CONCURRING NOT SIGNING**



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

**MARCH 17, 2025**

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

**JAZMIN LUCERO  
MEHR & ASSOCIATES  
CHERNOW, PINE AND WILLIAMS**

**RL/cs**

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