

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

SHANE DEMILLE, *Applicant*

vs.

**GR TRUCKING LLC;
ZURICH AMERICAN INSURANCE COMPANY,
administered by GALLAGHER BASSETT SERVICES, *Defendants***

**Adjudication Number: ADJ19059498
Sacramento District Office**

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact, Order (F&O) issued on November 25, 2024 by a workers' compensation administrative law judge (WCJ). The WCJ ordered that applicant's claim for workers' compensation benefits be denied and that he take nothing on account of his claim because of his finding that applicant was the initial physical aggressor (Lab. Code, § 3600(a)(7)), in an altercation that caused the July 6, 2023 injury to his head.

Applicant contends that while employed as a truck driver, applicant was assaulted by a third-party, angry driver named Jeffrey Cameron, who blocked applicant's vehicle and punched him in this head, and that applicant made no threatening gesture or physical contact with Mr. Cameron; that the WCJ's conclusion that Mr. Cameron only escalated the altercation by punching applicant in the head after applicant splashed water onto Mr. Cameron's vehicle is contrary to the "reasonable person perception" standard in initial aggressor cases because splashing water is not an act that any reasonable person would perceive to be a "real, present and apparent threat of bodily harm" (*Mathews v. Workers' Comp. Appeals Bd.* (1972) 6 Cal.3d 719, 727).

Defendant filed an Answer to Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration and Notice of Transmission (Report), recommending that the petition be denied.

We have reviewed the record in this case as well as the allegations in the Petition for Reconsideration and the Answer, and the contents of the Report.

DISPOSITION

We grant applicant's Petition for Reconsideration pursuant to Labor Code¹ section 5906, for further consideration of the factual and legal issues presented therein "on the basis of the evidence previously submitted in the case." (Lab. Code, § 5906; *Earley v. Workers' Comp. Appeals Bd.* (2023) 94 Cal.App.5th 1, 13-15 [88 Cal.Comp.Cases 769].) Reconsideration is warranted in this matter under section 5903, subdivision (c), which states that reconsideration may be sought on the grounds that "the evidence does not justify the findings of fact." (Lab. Code, § 5903(c).)

Our order granting applicant's Petition for Reconsideration is not a final order subject to writ of review.² (Lab. Code, § 5950 et seq.; see *Earley, supra*, 94 Cal.App.5th at pp. 13-15 [the Appeals Board has the authority to issue a final decision when it grants reconsideration but is not required to do so].) We defer issuance of our final decision on the merits of the Petition for Reconsideration (*Ibid.*)

THE GRANT IS TIMELY ISSUED PURSUANT TO SECTION 5909

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

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

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 18, 2024 and 60 days from the date of transmission is Sunday, February 16, 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 Tuesday, February 18, 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 December 18, 2024, and the case was transmitted to the Appeals Board on December 18, 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 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 December 18, 2024.

DISCUSSION

The sole issue presented herein is whether applicant sustained a compensable injury pursuant to section 3600. (Lab. Code, § 3600(a) [workers’ compensation liability “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.”] Specifically, the factual issue presented in this case is whether the condition of compensability in section 3600, subdivision (a)(7), is met in

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.”

this case, or whether applicant's injury arose "out of an altercation in which [he was] the initial physical aggressor." (Lab. Code, § 3600(a)(7).) Whether an employee's injury arose out of and in the course of his employment is a question of fact to be determined in light of the circumstances of the particular case. (See *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291, 297 [80 Cal.Comp.Cases 489].) Applicant bears the burden of proof to establish that his injury arose out of and in the course of employment pursuant to section 3600. (*Id.*, at p. 297.)

In this case, however, it was defendant's burden to establish that applicant's injury did *not* arise out of his employment because it was caused by an altercation in which he was the "initial physical aggressor." (Lab. Code, § 5705 Lab. Code, § 5705 ["burden of proof rests upon the party or lien claimant holding the affirmative of the issue"]; see *Industrial Indem. Co. v. Industrial Acci. Com.* (1952) 108 Cal.App.2d 632, 636 [1952 Cal. App. LEXIS 1719] ["defense was an affirmative one and the burden was on petitioner"].)

Section 3600, subdivision (g), bars recovery only when two conditions are present. First, the injury for which workmen's compensation is sought must "arise out of an altercation." Second, the injured employee must be the "initial physical aggressor" in that altercation. 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 subdivision (g) of section 3600, which deny compensation to persons so injured, must be narrowly and strictly construed.** (See *Fruehauf Corp. v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 569, 577 [68 Cal. Rptr. 164, 440 P.2d 236].)

...

The second condition of section 3600, subdivision (g), presents more difficulty; it requires us to determine what type of conduct the Legislature intended to discourage when it denied compensation to an "initial physical aggressor." As Larson has pointed out, one of the practical difficulties in attempting to bar an aggressor from benefits is "the homely fact that, long after a quarrel is over, it is often almost impossible to determine who really started it." (1 Larson, *Workmen's Compensation Law* (1968 ed.) § 11.15(c), p. 159.) Section 3600, subdivision (g), "imposes the necessity of selecting one overt act out of a series of hostile verbal, psychological, and physical acts as the one that, for compensation purposes, caused the quarrel and elicited the ultimate injury." (*Id.*)

The Legislature's use of the word "physical" indicates that it was primarily concerned with the increased risk of injury which arises when a quarrel moves from an exchange of hostile words and nonviolent gestures to a trading of physical blows. Thus, one is not an "initial physical aggressor" so long as he confines his antagonism to arguments, epithets, obscenities or insults. **Instead, 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. . . .” (*Briglia v. Industrial Accident Commission* (1962) 27 Cal. Comp. Cases 217, 218.)

. . .

Applicant argues that Mathews could not have been the “initial physical aggressor” because he did not “throw the first punch.” However, the Board has properly held that “[it] is not necessary that there be a battery before one can be deemed a physical aggressor” (*Rosenthal v. Wong* (1964) 30 Cal.Comp.Cases 103, 104); ““bodily contact . . . is not the significant factor.”” (*Briglia v. Industrial Accident Commission, supra*, 27 Cal.Comp.Cases 217, 218.) **He who by physical conduct first places his opponent in reasonable fear of bodily harm is the “initial physical aggressor.” His act need not actually cause physical harm; throwing a punch or shooting a gun is not necessary. Under appropriate circumstances, clenching a fist or aiming a gun may be sufficient to convey a real, present and apparent threat of physical injury.**

. . .

Rather the section bars compensation to the “initial physical aggressor,” to him who first introduces an element of physical violence into the confrontation, thus creating the risk of injury.

(*Mathews v. Workers’ Comp. Appeals Bd.* (1972) 6 Cal.3d 719, 726-728 [37 Cal.Comp.Cases 124] (*Mathews*), emphasis added, footnotes omitted.)³

The WCJ in this matter found that defendant met its burden of proof that applicant was the “initial physical aggressor” under section 3600, subdivision (a)(7), and therefore that he take nothing from his claim. (F&O, Finding of Fact no. 3, Order.) The WCJ made this determination based on the following:

Defendant proved by a preponderance of the evidence that Applicant intentionally threw water out the passenger side window of his truck with the intention of hitting Mr. Camron’s pickup truck...The other driver’s conduct of “flipping the bird” to Applicant does not establish physical aggression. Applicant’s act of throwing a liquid at the other driver was the first physical contact/aggression between the parties.

(Opinion on Decision, pp. 3-4.)

Unfortunately, the record in this matter is incomplete as Applicant’s Exhibit 2, a video of the altercation, is unavailable for our review and reconsideration. Applicant’s Exhibit 2 is titled

³ *Mathews* refers to section 3600, subdivision (g), which is now section 3600, subdivision (a)(7).

“Flash drive with video of the incident, dated July 6, 2023 [*WCJ Brown will retain possession of the flash drive.*]” (Minutes of Hearing and Summary of Evidence, October 29, 2024, p. 2 (referred to herein as “video”).)

The video of the altercation is a key piece of evidence relied on by the WCJ to assess applicant’s credibility *and* as direct evidence that applicant intentionally threw water out of his truck window at Mr. Cameron’s vehicle *in such a way* that it could cause a reasonable person to perceive themselves in “real, present and apparent threat of bodily harm” as required by the Supreme Court. (See *Mathews, supra*, 6 Cal.3d at p. 727.) The WCJ relied on the video contained on the flash drive to assess the credibility of applicant’s testimony:

The dashboard camera on the company dump truck Applicant was driving recorded portions of the events in question. The other driver pulled in front of Applicant as they approached an intersection. Then Applicant pulled up alongside the other driver. The other driver then drives around other cars and used his pickup truck to block Applicant's vehicle. The drivers are then seen interacting outside of the vehicles. (App. Ex. 2)

...

Applicant’s testimony regarding the event is found to lack credibility based on the mechanics he described, *the video establishing he pulled up alongside the other auto*, how far apart the cars were and the numerous contemporary statements that contradict his testimony at trial.

(F&O, Opinion on Decision, p. 3, emphasis added.)

The WCJ also relied on the video contained on the flash drive to conclude that applicant intentionally threw water out of his truck window at Mr. Cameron’s car, and that such an action “verges on criminal conduct that reasonably can be considered to cause physical harm to the target making Applicant the initial physical aggressor as considered by Labor Code Section 3600(a)(7).” (Report, p. 3 citing to Vehicle Code, § 23110 [anyone throwing a substance at another vehicle or occupant of a vehicle is guilty of a misdemeanor; anyone with willful, malicious intent to do great bodily injury by throwing substance capable of doing serious bodily harm at a vehicle or occupant is guilty of felony].)⁴

⁴ We note that the Supreme Court rejected “the suggestion that in defining the conduct proscribed by section 3600, subdivision (g), we should be governed by the rules of criminal law defining assault...Its technical rules and distinctions should not be applied mechanically to workmen’s compensation law.” (*Mathews, supra*, 6 Cal.3d at p. 727, fn. 4.)

However, the Report includes only the following and very limited description of the contents of the video:

Shane Demille (Applicant) was injured on July 6, 2023, when he was involved in a physical altercation with Jeffery Cameron. Applicant was driving a truck for his employer when he pulled up next to Mr. Cameron and threw water out of his window onto the pickup truck driven by Mr. Cameron. The video clearly shows open area in front of Applicant when he stopped next to Mr. Cameron. The video does not show Mr. Cameron's pickup truck when this altercation occurred. The window of Mr. Cameron's pickup truck was down when he pulled in front of Applicant and exited the pickup truck.

(Report, p. 2.)

An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; Cal. Code Regs., tit. 8, § 10787; *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc).) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record." (*Hamilton, supra*, at p. 475.)

In this matter, we are faced with the second condition of section 3600, subdivision (a)(7), which requires us to reconsider disputed issues of material fact in this matter regarding whether applicant was the "initial physical aggressor" pursuant to section 3600, subdivision (a)(7). This reconsideration includes whether applicant did or did not intentionally throw water out of his truck window, and whether or not that action introduced "an element of physical violence into the confrontation, thus creating the risk of [his] injury." (*Mathews, supra*, 6 Cal.3d at p. 728.) In other words, we must determine whether the evidence supports the WCJ's finding that applicant was the "initial physical aggressor" pursuant to section 3600, subdivision (a)(7). However, without the video, we cannot conduct a meaningful review on reconsideration. The Appeals Board has determined that the video remained in the possession of the WCJ, and the WCJ has agreed to forward Applicant's Exhibit 2, the video, to the Appeals Board.

Accordingly, in order to provide a meaningful review on reconsideration, we must grant reconsideration so that we can review the video prior to issuing a final decision on the merits.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact, Order issued on November 25, 2024 by a workers' compensation administrative law judge is **GRANTED**.

IT IF FURTHER ORDERED that the final decision after reconsideration on the merits of applicant's Petition for Reconsideration of the Findings of Fact, Order issued on November 25, 2024 by a workers' compensation administrative law judge is **DEFERRED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 18, 2025

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

**SHANE DEMILLE
EASON & TAMBORNINI
HANNA, BROPHY, MacLEAN, McALEER & JENSEN, LLP
GR TRUCKING LLC
GALLAGHER BASSETT SACRAMENTO**

AJF/oo

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