WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LORINDA LEIGH, *Applicant*

vs.

CVS HEALTH CORPORATION; XL INSURANCE COMPANY, Administered By SEDGWICK CLAIMS MANAGEMENT SERVICES, INCORPORATED, *Defendants*

Adjudication Number: ADJ12788201
Long Beach District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant CVS Health Corporation[1] seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact and Order of January 23, 2026, wherein it was found, "Pursuant to Labor Code § 4553, the applicant was injured as a result of the serious and willful misconduct of her manager." (Finding No. 3.) In this matter, while employed on November 14, 2019 as an assistant store manager, applicant sustained admitted injury to the right forearm, right wrist, right fingers, right shoulder, right hand, and psyche. However, "the nature and extent of Applicant's injuries are all deferred pending further discovery."

Defendant contends that the WCJ erred in finding that applicant was injured as a result of serious and willful misconduct pursuant to Labor Code section 4453. We have received an Answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below we find that applicant did not carry her burden of showing that serious and willful misconduct was the proximate cause of any November 14, 2019 specific injury. We therefore grant reconsideration, rescind the WCJ's decision, and issue a new decision reflecting

[1] In the Petition, "XL Insurance America … compensation carrier for CVS Health Corporation" is identified as the petitioning party. However, although XL Insurance may provide a defense to the claim of serious and willful misconduct, any finding and award is made against the employer. (Ins. Code, § 11661.) Thus, CVS Health is the aggrieved party, and we consider the Petition to be filed by CVS.

that the November 14, 2019 injury was not proximately caused by defendant's serious and willful misconduct.

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.
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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 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 March 2, 2026 and 60 days from the date of transmission is May 1, 2026. This decision is issued by or on May 1, 2026, 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 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 March 2, 2026, and the case was transmitted to the Appeals Board on March 2, 2026. 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 March 2, 2026.

Turning to the merits, the only trial testimony in this matter was the testimony provided by the applicant. At trial, applicant testified that she went from the main part of the store into the warehouse to dispose of sugar that was leaking from a bag. The sugar and the damaged sugar bag were in a tote bag that applicant was carrying from the main part of the store to the trash bins in the warehouse portion of the store. She described the tote bag as a bag that was 2½ feet by 1½ feet by 1 ½feet and which weight approximately five pounds.

Upon entering the warehouse portion of the store, she encountered her manager, Eric Neice. She testified that Mr. Neice asked why she was in the warehouse and yelled at her to get back on the sales floor. According to the Summary of Evidence, "She tried to explain again, and she continued to the trash bins, but he did not order her to stop, and that is all she remembers him saying. She took two more steps and stopped because he rushed her from 10 feet away and said nothing but grabbed her right arm and hand as he pressed up against her. He did not touch her left upper extremity. He was prying her fingers back from the tote, and her nails were digging into him. She did not understand his purpose. He tried to pull the tote away from her, and she did not let go because she was going to lose her balance or it would end up hitting her in the face, but she eventually let it go after she was trying to hold on to it to prevent herself from falling back." Applicant further testified that "After he grabbed the tote, he said nothing, and she went back into the store." (Minutes of Hearing and Summary of Evidence of December 4, 2025 trial at p. 6.)[2]

Labor Code § 4553 states:

> The amount of compensation otherwise recoverable shall be increased one-half, together with costs and expenses not to exceed two hundred fifty dollars ($250),

[2] Mr. Neice did not testify at trial, but a transcript of his May 15, 2020 deposition testimony was admitted into the evidentiary record. Mr. Neice testified that he was frustrated that applicant was repeatedly coming into the warehouse when he had asked her to stay on the sales floor and that he "wanted to get the tote away from her so she would hopefully go back to work." He acknowledged in his testimony that he yanked the tote bag from the applicant who put up some resistance to the bag being yanked, but he didn't remember it "being a struggle." Mr. Neice denied making contact with applicant's finger or hand, but acknowledged that applicant said "ow, that hurt" after the tote was yanked and that later applicant told her that he had hurt her arm. (May 15, 2020 deposition of Eric Neice at pp. 46-59.) Mr. Neice testified that the taking of the tote bag lasted "a couple of seconds." (Deposition at p. 75.) However, the WCJ found the applicant's testimony credible (Opinion on Decision at p. 2), and therefore we take applicant's version of the events as true. (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)

> 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.

Johns-Manville Sales Corp. v. Workers' Comp. Appeals Bd. (Horenberger) (1979) 96 Cal.App.3d 923, 930-931 [44 Cal.Comp.Cases 878] contains an in-depth discussion of the significant findings necessary to impose "serious and willful" liability. The *Horenberger* court explained that:

> [W]illful misconduct has a well-established meaning which is clearly differentiated from negligence and gross negligence. [Citations.] Gross negligence involves a failure to act under circumstances that indicate a passive and indifferent attitude toward the welfare of others. Negative in nature, it implies an absence of care. [Citations.] Willful misconduct, on the other hand, 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. [Citations.]

In *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d 102, 117 [18 Cal.Comp.Cases 3], the Supreme Court explained that "'Willful misconduct' means something different from and more than negligence, however gross. The term "serious and willful misconduct" is described … as being something "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" … The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence.'" (Quoting *Porter v. Hofman* (1938) 12 Cal.2d 445, 448.)

In *Hawaiian Pineapple Co. v. Ind. Acc. Com.* (1953) 40 Cal.2d 656, 663-664 [18 Cal.Comp.Cases 94], the Supreme Court held that "A 'reckless disregard' of the safety of employees is not sufficient in itself unless the evidence shows that the disregard was more culpable than a careless or even a grossly careless omission or act. It must be an affirmative and knowing

disregard of the consequences. … the employer [must have] knowledge of the consequences of its act or omission necessary to make the performance of that act or omission a willful one."

The *Horenberger* court noted that:

> The basis for serious and willful misconduct has been aptly summarized as including three alternatives: '(a) a deliberate act for the purpose of injuring another; (b) an intentional act with knowledge that serious injury is a probable result; or (c) an intentional act with a positive and reckless disregard of its possible consequences.' [Citations.] It follows that an employer guilty of serious and willful misconduct must know of the dangerous condition, know that the probable consequences of its continuance will involve serious injury to an employee, and deliberately fail to take corrective action. [Citations.]

(*Horenberger*, 96 Cal.App.3d at p. 933.)

> "While the line between gross negligence and wilful misconduct may not always be easy to draw, a distinction appears … in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while wilful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the [L]egislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence and that this misconduct must be wilful. While the word 'wilful' implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But wilful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Wilful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result."

(*Mercer-Fraser, supra*, 40 Cal.2d at p. 118, quoting *Meek v. Fowler* (1935) 3 Cal.2d 420, 425–426 [45 P.2d 194].)

Finally, even if the applicant can prove these elements, he must also prove that the conduct "was the proximate cause of h[is] injury." (*Horenberger*, 96 Cal.App.3d at p. 934.)

In this case, even fully crediting the applicant's testimony, we cannot conclude that Mr. Neice's actions in prying the tote bag from the applicant met the stringent test for constituting a serious and willful injury. We are in complete agreement with the WCJ that Mr. Neice's grabbing

of applicant's right arm and prying of her fingers back in order to secure the tote was completely inappropriate behavior from a manager. However, we cannot conclude that such an act, however egregious, was done with "**knowledge** that it [was] likely to result in **serious** injury, or with a wanton and reckless disregard of its possible consequences" (*Mercer-Fraser Co., supra,* 40 Cal.2d at p. 117 [emphasis added].) We cannot conclude that grabbing a bag from someone, even involving grabbing of the arm and prying of the fingers to do so, evinced an intent from the manager to harm the applicant or that such an action was likely to result in serious injury (and, without minimizing applicant's injuries, the nature and extent of which were deferred, it is unclear if this incident did lead to "serious" injury, as contemplated by the statute).

In coming to the findings, the WCJ relied upon many prior acts of harassment and aggressions either physical like throwing objects at the applicant or verbal such as calling applicant "granny" or "limpy." Although we do not condone Mr. Neice's management style, to put things euphemistically, even with this added context we cannot conclude that grabbing the bag was done with intent to cause harm or done with a conscious disregard of risk to cause serious harm. We note that applicant has alleged a specific injury in this matter and has alleged that this November 14, 2019 specific injury constituted serious and willful misconduct. Thus, these prior acts, while possibly evidence of intent, are of limited probative value with regard to the harm caused or which could have been caused by grabbing a tote bag out of the applicant's hand.

Accordingly, we will grant reconsideration, rescind the WCJ's decision, and issue a new decision reflecting that applicant's November 14, 2019 specific injury was not proximately caused by reason of serious and willful misconduct.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings of Fact and Order of January 23, 2026 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order of January 23, 2026 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. LORINDA LEIGH, did at Santa Ana, California, on November 14, 2019, sustain an injury to the right forearm, right wrist, right fingers, right shoulder, right hand and psyche arising out of and occurring in the course of employment as an assistant store manager (occupational group number in dispute) by CVS HEALTH CORPORATION whose compensation insurance carrier was XL INSURANCE CO., administered by SEDGWICK.

2. The parties stipulated that all periods of temporary disability have been adequately compensated and the employer has furnished some medical treatment.

3. The applicant's November 14, 2019 specific injury in this matter was not proximately caused by any serious and willful misconduct of her manager pursuant to Labor Code section 4553.

4. All other issues are deferred, with jurisdiction reserved.

ORDERS

IT IS ORDERED that the applicant take nothing by way of her Petition for Serious and Willful Misconduct of Employer pursuant to Labor Code section 4553.

IT IS FURTHER ORDERED that the parties are to meet and confer and/or conduct further discovery on all other deferred issues, including permanent disability and further medical treatment. The court reserves jurisdiction over all remaining issues.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 1, 2026

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

LORINDA LEIGH
JANOFF, KARPEL & COWAN
PEARLMAN, BROWN & WAX

DW/oo

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