

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

JOSEPH GROSS, *Applicant*

vs.

**VALLEY TRUCK & TRAILER, INC.;;
AMGUARD INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13840656
Oakland 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.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 14, 2023

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

**JOSEPH GROSS
LAW OFFICES OF VINCENT J. SCOTTO, III
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

HAV/ara

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION
(Oakland Venue)**

I. INTRODUCTION

Date of Injury:	April 30, 2020
Party of Body Injured:	left ankle and left foot (denied claim)
Petitioner:	Defendant
Timeliness:	The petition, filed on December 16, 2022 is timely
Verification:	The petition is verified

Petitioner's Contention: Petitioner/Defendant AmGUARD Insurance Company files for reconsideration of the decision finding injury AOE/COE and entitlement to medical treatment.

II. FACTS

Applicant Joseph Gross was employed as a driver with defendant Valley Truck & Trailer when the COVID pandemic began. Applicant alleges a specific injury on April 30, 2020 when he had an accident resulting in a broken left ankle and left foot. The injury was serious and medical treatment was required, including surgery. The employer defendant Valley Truck & Trailer vehemently denies the injury and also employment on the basis that applicant was laid off on March 19, 2020 due to the COVID pandemic. Applicant alleges that after he was laid off due to the pandemic, he performed work off the books for cash payment. The employer disavows this, and attempted to shred applicant's credibility at trial, from applicant's time of hire and his job application. The QME in this case is Dr. Eduardo Lin who evaluated the medical records and affirms the need for medical treatment but does not speak to the employment issues.

This is the type of case which is riddled with inconsistencies. Although many puzzle pieces are missing, the full picture is clear enough, especially consideration of the bombastic conduct of the employer Mr. Eric Hoopes at trial. As set forth in the Findings, Award and Opinion on Decision dated November 21, 2022, applicant's injury of April 30, 2020 was found compensable.

An Answer has been filed.

III. DISCUSSION

The parties proceeded to a full day of trial, resulting in conflicting stories between applicant Joseph Gross and Mr. Eric Hoopes, employer/owner of Valley Truck & Trailer. As stated in the opinion on decision, where the accounts contrast sharply, the documentary evidence is paramount. Throughout defendant's Petition for Reconsideration, defendant requests that the Appeals Board affirm the employer witness's version of the facts based on his word. However, in cases which hinge on credibility, where even friendly witnesses are not consistent, and where the incident took place years ago, the undersigned trier of fact here does not rely on any testimony which is not

supported by documents in evidence. It is well established that case law grants great deference to the credibility determinations of the trial judge.

Applicant was hired in September or October 2019 by Valley Truck & Trailer and his last official day of work was March 9, 2020 and he was laid off on March 16, 2020. (Ex. D.) At trial, the parties stipulated that applicant held the position of driver. (Minutes of Hearing/Summary of Evidence of 09-20-2022, hereinafter “MOH/SOE,” at p. 2, Stipulation number 1.) The employer is Eric Hoopes who hired applicant and Mr. Hoopes ran the business. Despite the stipulation, Mr. Hoopes testified at length that applicant was hired as a service writer. (Id., at p. 10/lines 32-41.) Payroll records affirm applicant’s employment with Valley Truck & Trailer. (Ex. D at p. 0012-0020.) Applicant was never employed by Go Green Transportation which was another company run by Mr. Hoopes from the same location. (Id., at p. 0027-0028, 0040-0041.)

Applicant originally alleged injury on March 20, 2020 against Go Green when he stepped off an auto-lift. (Application for Adjudication of Claim dated November 6, 2020.) The Application was amended to reflect the correct employer, Valley Truck & Trailer. (Amended Application for Adjudication of Claim dated November 17, 2020.) The Application was amended again to reflect the date of injury of April 30, 2020. (Second Amended Application for Adjudication of Claim to correct date of injury, dated October 20, 2021.)

At trial, applicant could not remember the exact date that he started with the employer but it was in September of 2019 and he testified that his last day was April 30, 2020, when his boss called him in for work. (MOH/SOE at 5/lines 34-38.) This is the date of injury, according to applicant.

Applicant testified that he was getting paid by check until March 19, when the COVID pandemic shut down the employer and other non-essential companies, and between March 20, 2020 and the date of injury, applicant was called in to work and was paid in cash. (Id., at 6/lines 40-42.)

After March 19, 2020, applicant applied for unemployment, despite doing work on a “call-in basis.” (Ex. D, EDD Notice of Unemployment Insurance Claim Filed, Mail Date 04-03-2020, SDT record pp. 0027-0028.) Applicant testified that despite the layoff, applicant continued to work for the employer on a “call-in basis” and he would receive cash payment each day he worked. (Id., at 6/lines 40-42.) Applicant testified that he used multiple employer names to apply for unemployment because he believes the employer Mr. Hoopes had “four different companies under one umbrella” and he was not sure which company to use to claim unemployment. (MOH/SOE at 5/lines 29-32.)

Exhibits offered by both applicant and defendant show that applicant sought treatment on April 30, 2020, with O’Brien After-Hours Urgent Care. (Ex. 5 and Ex. F.) The clinic notes state applicant presented with a “severely swollen L [left] ankle” with “severe pain.” (Id.) At trial, Applicant testified that on April 30, 2020, the boss called him in for work and applicant’s friend Russell Walker dropped him off at work to borrow applicant’s truck. (MOH/SOE at 5/lines 34-38.) That day at work, applicant had a list of things to do and to put away because of the COVID shut down. (Id.) Mr. Walker was not available to testify as he is deceased. (Id., at 7/lines 19-21.)

On the day of the injury, applicant was at work using the forklift with extensions for the forks, the extensions being about six or seven feet long. (Id., at 6/1-12.) He was moving one extension when he stepped on arm of the auto lift. (Id.) The auto lift arm was not locked into place, and it moved, causing applicant to fall and his ankle to crack, then to make matters worse, the heavy fork extension fell on his ankle. (Id.) The extension is approx. 6 feet and weighs 130 pounds. (Id.) Applicant testified that no one saw him fall but they heard the aftermath, as he was screaming because his ankle was “shattered in seven places” and it hurt. (Id.)

Applicant testified that the employer Eric Hoopes and another guy Phil, who works at the worksite, responded. (Id., at 6/lines 14-31.) As applicant was on the ground, Mr. Hoopes and Phil tried to help applicant up by grabbing his armpits but it hurt too much and they could not move applicant. (Id.) Applicant asked for ambulance and Mr. Hoopes said, “Don’t worry” because he (Mr. Hoopes) would take care of everything. (Id.) Mr. Hoopes retreated to his office but did not call an ambulance. (Id.) Applicant called his friend Russell Walker who had applicant’s truck and was just around the corner. (Id.) When Mr. Walker arrived, Mr. Hoopes operated forklift to lift applicant off the ground and load him into the back of his pickup truck. (Id.) However, Mr. Hoopes denies that he or anyone ever loaded applicant onto his truck with a forklift. (Id., at 11/lines 31-34.)

Applicant’s friend Kaaren Madsen appeared at trial and credibly testified that she often walked in the neighborhood and knew where applicant worked. (MOH/SOE at 8/28-37.) She happened to be walking in the area and saw applicant being loaded into his pickup truck. (Id.) Defendants take issue with Ms. Madsen’s recollection of an iron fence around the employer’s premises and the height thereof which contradicts with Mr. Hoopes testimony that there was no fence around the premises at the date of injury. However, defendant offered no definitive evidence (such as a photo or independent witness testimony) regarding the fence. Since applicant was transported via his truck which had to be driven onto the premises and lifted by a forklift, a fence may not have obstructed Ms. Madsen’s view. I am convinced that Ms. Madsen was accurate in her recounting of the highly unusual scene of her friend the applicant being hoisted on a forklift onto his truck bed on the premises of the employer’s business which is in her neighborhood.

In contrast, throughout the trial, Mr. Hoopes attempted to describe suspect behavior by applicant. Mr. Hoopes testified that applicant would come by the premises after his lay off to borrow items, and this was unusual behavior. (MOH/SOE at 12/lines 8-14.) Mr. Hoopes denied that applicant was on the premises on April 30, 2020 but instead said that applicant came by on April 20, 2020, around 9:30 a.m., mid-morning. Applicant was “hopping around” and holding onto his vehicle and that applicant had already been to see Dr. O’Brien. (Id., at 12/lines 1-20; 13/lines 24-27.) Applicant claimed to have injured his leg moving furniture with a friend, by falling out of his truck, probably as a result of applicant’s own U-Haul business. (Id.) However, there is no evidence aside from Mr. Hoopes’ testimony that applicant had his own business. Mr. Hoopes testified that on April 20, 2020, applicant stopped by to use the bathroom, and that he had already visited Dr. O’Brien. (Id.) Mr. Hoopes denied directing any employee to Dr. O’Brien. (Id.) This line of testimony by the employer is unsupported by any contemporaneous evidence, records, or other witness testimony. Therefore, the testimony which cannot be substantiated is not reliable.

Mr. Hoopes did receive notices from EDD, as applicant made a claim under the other company “Go Green” and Mr. Hoopes submitted paperwork that applicant did not work for that company. Go Green is a shuttle company run from the same location which ran shuttles for the Peralta School District. (Id., at 7/9-11.) Go Green was also shuttered at the onset of the COVID pandemic. Applicant’s paystubs show that he worked for Valley Truck & Trailer, so applicant is mistaken in his unemployment filing and in his testimony as to his paychecks. (Ex. D at 4-10.)

In the petition for reconsideration, defendant seeks to rely on Mr. Hoopes’ denial that he owned or operated other companies. (See MOH/SOE at 10/25-30.) This is perplexing and inaccurate because the EDD documentation in applicant’s personnel file documents clearly show that Go Green Transportation exists, has a Employer Payroll Tax Account Number of 005-2359-3, and Mr. Hoopes responded to EDD on behalf of this business. (Ex. D, subpoenaed records from Valley Truck & Trailer, at 18 (subpoena records page number 0041). At trial, no other owner was identified for Go Green Transportation. Mr. Hoopes also testified that applicant had refused to work for Go Green Transportation because applicant “did not want to be around special needs children.” (Id. at 11, lines 8-10.) Though he claimed no ownership of Go Green, Mr. Hoopes incredibly testified to its operating details.

The trial was halted when Mr. Hoopes would not refrain from angrily expressing his opinion that he was the aggrieved party because of applicant dishonesty in representing his prior job experience and in the pursuit of this claim. The trial was conducted via Lifesize video and during this his tirade, Mr. Hoopes did not realize for several minutes that we were off the record and both the undersigned and the court reporter had turned off their camera to the blue screen. While we were off the record and not visible on our screens, the court reporter and me together in our office, as well as all others on the call, observed Mr. Hoopes continue his rant about being victimized by applicant. Based on his demeanor and his insistence on testifying to irrelevant information, without due respect for the questioning by the attorneys or the court proceedings, Mr. Eric Hoopes’ behavior casts doubt upon his testimony in and of itself. Therefore, without other supporting documentation, the testimony of Eric Hoopes is not reliable.

The contemporaneous medical record state a slightly different mechanism of injury than that described by applicant at trial, but a serious injury is evident. Applicant testified he was lifting a heavy fork extension, stepped wrongly, twisted and injured his ankle, and then the heavy fork fell on his ankle. The record of O’Brien After-Hours Urgent Care states only “twisted ankle, heard pop, severe pain.” (Ex. 5 and Ex. F.) Dr. Martha Singer of Sutter Health performed surgery on May 3, 2020, followed by pre-op visits on May 3, May 19, and May 26. (Ex. 1, Ex. 3, Ex. 4, Ex.6.) Exhibit 6 are the relevant records from Sutter Health. The operative report signed by Dr. Singer on May 4, 2020 is slightly different as to the mechanism of injury. Dr. Singer states:

“Mr. Gross sustained a ground level injury to his left ankle **stepping out of his truck** 2 days ago. He was seen by another facility where x-rays were done. He was splinted. He presented to the emergency department here requesting fixation.” (Ex. 6 at 2, emphasis added.)

In a follow up report, Dr. Singer reports:

“Mr. Gross is a 58-year-old man who presents to the emergency department with outside images. He describes that yesterday he **stepped out of his truck and turned the left ankle. He said it was poking out at 90 degrees.** He straightened it out himself and was seen at Regional Medical Center, where he had x-rays, was splinted and they apparently told him to follow up with outside Ortho.”

“He spoke to his primary care, Dr. O’Brien, who told him he was going to need surgery. I believe that there were x-rays from Dr. O’Brien as well. In the meantime, Mr. Gross had also called our operating room, who advised him to go to the emergency department.”

“Mr. Gross has a reasonable looking splint on the left lower extremity, it is removed. The skin is intact medially and laterally. There is swelling such that the skin does not wrinkle, but the skin is otherwise intact. He is very sensitive...

“Past medical history is missing. He described decreasing his smoking, but he is a current smoker. He describes prior right knee patellar reconstructive surgery and prior left hand shrapnel injury. He is a veteran, but he does not have veterans [sic] benefits. He is currently unemployed.” (Ex. 6 at 13, emphasis added.)

There is a “progress note” dated May 3, 2020 by Dr. Hasib Danai within the Sutter Health records. Dr. Danai had a different report of the mechanism of injury, which incorporates a “metal rod” and mentioned that applicant’s primary care physician or “PCP” is Michael Obrien. (Ex. 6 at 10.) Dr. Danai writes:

“Joseph Gross is a 58 year old male current smoker with no significant PMHx who presented to the ED for left ankle fx [fracture], closed and is being admitted for left ankle ORIF [surgery] in AM.

“Patient was in normal state of health when trying to get out of his pickup truck and twisted his left ankle after **stepping on a metal rod.** He heard a crack and went to an outpatient hospital where he couldn’t get surgery due to health insurance coverage...” (Ex. 6 at 10, emphasis added.)


According to the “case tracking events” applicant was “in facility” and admitted on Saturday, May 2, 2020 at 12:04 p.m. (Ex. 6 at 4.) Surgery was performed on Sunday, May 3, 2020 starting at 11:53 a.m. (Ex. 6 at 4.) Dr. Singer discharged applicant from the hospital on May 5, 2020. (Ex. 6 at 5.)

Despite the discrepancy of applicant’s mechanism of injury (stepping out of a truck) and his employment status (currently unemployed), the medical record shows that applicant needed emergency surgery after he saw Dr. O’Brien. The severity of the injury as described by applicant and the contemporaneous medical records as well as the QME show that no one would not have waited ten days between April 20 and April 30 to seek medical treatment. The fact that the

Application for Adjudication was amended several times does not reflect upon applicant's credibility, rather applicant attorney's efforts to perfect the record because applicant's memory is not perfect. Applicant sustained an injury on April 30, 2020.

Applicant testified that Mr. Hoopes gave \$350 to applicant's friend Mr. Walker and directed applicant to go see Dr. O'Brien who will be waiting. Applicant offered a receipt from O'Brien After-Hours Urgent Care at 20100 Lake Chabot Road in Castro Valley, California, admitted as Exhibit 5. Curiously, by way of Exhibit F defendant offered the same document as Exhibit 5, but only the first page. (Ex. 5 at 1, Ex. F.) The first page by Dr. O'Brien corroborates with the testimony on the date of injury on April 30, 2020 and the extent of injury, as shown in the Sutter Health records. Specifically, Dr. O'Brien states that applicant presented with "severely swollen L [left] ankle" from a twisting injury and memorializes that x-rays were taken and given to the patient. (Id.) The second page of Exhibit 5 corroborates applicant's testimony that \$350.00 was paid to the doctor in cash and this cash was from Mr. Hoopes.

Importantly, on the first page of both exhibit 5 and exhibit F, Dr. O'Brien states the "Emergency contact" is "Eric" and lists the following phone numbers "(w) 510-889-8103" and "510-464-7336." (Ex. 5 at 1, Ex F.) Applicant's personnel records offered by defendants show that in fact these are two phone numbers belonging to Eric Hoopes. First, as declared under penalty of perjury to the Employment Development Department Exhibit D, subpoena records page number 004, was signed by Mr. Hoopes as follows:

Employer and Contact Information:	
Employer Name:	GO GREEN TRANSPORTATION
Employer Payroll Tax Account Number:	005-2959-3
By signing below, I certify that I am an authorized representative and the information provided in response to this notice is true and correct. I understand that any false statement, false representation, or failure to report a material fact may result in employer penalties and charges.	
Print Name:	ERIC HOOPES
Phone No:	510-464-7336
Ext.:	
Signature:	
Title:	GEN. MGR.
Date:	09.15.21
DE 1101CZ Rev. 8 (10-17)	
2 of 2	
0041	

(Ex. D at 18.) In his own handwriting, Mr. Hoopes lists his phone number as (510)464-7336, same as on the form by Dr. O'Brien.

Second, the Board is referred to applicant's EDD claim for Disability Insurance wherein Mr. Hoopes completed a "Notice to Employer of Disability Insurance Claim Filed" with an EDD mailing date of December 12, 2020. (Ex. D at 13-14.) Page 2 of this form shows that it was completed by "Eric Hoopes" at area code and direct phone number (510)889-8103. (Id.) These are defendants' own exhibits and they show that *both* phone numbers belong to Mr. Hoopes. There is no other reason that Mr. Hoopes would be the contact with Dr. O'Brien on behalf of applicant but for the injury at the employer's premises. Assuming *arguendo* it was applicant who provided all the information Dr. O'Brien, it is doubtful that applicant would have provided *two* contact numbers for Mr. Hoopes while suffering from "severe pain." The only logical conclusion is that applicant was directed by Eric Hoopes to seek medical attention with Dr. O'Brien after being injured on the job and Dr. O'Brien was waiting for applicant and treated him at the request of the employer.

Lastly, the lack of records by Dr. O'Brien in response to subpoenas is a red herring. Defendant offered Exhibit G, a Custodian Affidavit from Dr. O'Brien dated September 19, 2021, showing no medical record in existence for applicant. In the affidavit, Dr. O'Brien's writes "not my patient" and a stamp shows the address of 20100 Lake Chabot Road in Castro Valley. Technically, it is true that applicant was never a patient of Dr. O'Brien. The evidence shows that applicant's only visit to Dr. O'Brien was at the behest of Mr. Hoopes on the date of injury. The record is devoid of any follow up or that patient relationship established. If there were no records found on September 19, 2021, it follows the doctor would again report no records on February 10, 2022, in response to a subsequent subpoena. (Ex. H.) The best evidence is the record of O'Brien After-Hours Urgent Care memorializing applicant's treatment on April 30, 2020, a document introduced in evidence by both parties. (Ex. 5 and Ex. F.)

Credibility determinations have been made based on the demeanor and appearances of the witnesses at trial. Careful consideration has been afforded to all of the exhibits in evidence. Based on a totality of the record, applicant suffered injury on April 30, 2020 and the injury is AOE/COE.

IV. RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration is **DENIED**.

DATE: 12-29-2022

Therese Da Silva
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE