WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MAURILIO PEREZ (Deceased), ***Applicant***

vs.

DYNAMIC AUTO IMAGES, INC.
dba DYNAMIC COLLISION OF VICTORVILLE;
UNITED WISCONSIN INSURANCE COMPANY, administered by
AMERICAN CLAIMS MANAGEMENT, ***Defendants***

Adjudication Number: ADJ10807065
Los Angeles 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.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 21, 2021

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

SUSAN TREJO MORENO, GUARDIAN AD LITEM
SOCORRO TREJO-MORALES
YARIELA PEREZ
RAUL PEREZ
JACQUELINE PEREZ
LAW OFFICES OF FRED L. FONG
LAW OFFICES OF DANYAL ROODBARI
ENGLAND, PONTICELLO & ST. CLAIR
PATRICO HERMANSON GUZMAN

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I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION
ON APPLICANT'S PETITION FOR RECONSIDERATION

I.
INTRODUCTION

Applicant Maurilio Perez (deceased), through the Law Offices of Fred Fong, who represents several of Mr. Perez's dependents, has filed a timely, verified and properly served reconsideration petition. This petition asserts that the WCJ erred in determining that decedent Perez's fatal accident due to a fall from a carport roof was not attributable to the defendant employer's serious and willful misconduct within the meaning of Labor Code section 4453. Petitioner makes this contention on the following grounds:

1. The WCJ should have found in favor of the applicant and his dependents based on evidence that the employer regularly dismantled carports and had no procedures in place to assure that the applicant would do this in a safe manner.

2. The general manager of defendant corporation should have rented safety equipment on behalf of decedent, who was the operations manager of the same corporation.

3. The fines imposed by OSHA in connection with the applicant's death and the records of the OSHA investigation support a finding of serious and willful misconduct.

II
FACTS

Applicant's reconsideration petition follows a two-day trial at which two different law firms represented a total of six dependents. Trial herein was solely on the issue of whether the applicant's death arose from the serious and willful misconduct of the defendant employer, Dynamic Auto Images, Inc. (a California Corporation, SOS entity No. C260680.) Defense counsel at this trial appeared solely on behalf of said corporate defendant who, pursuant to Insurance Code 11661, had no insurance for this risk.

The case in chief had previously resolved with the employer's insurer on 9/9/18 via order approving compromise and release in favor of the same six dependents at a substantial structured settlement figure. By its own terms, the settlement excluded any claim for serious and willful misconduct benefits.

The evidence at the S&W trial herein consisted of the testimony of Dynamic Auto Images business manager, Robert Zingg, together with a number of documents placed in evidence, including around 50 pages of records pertaining to the investigation conducted by the California DIR Division of Occupational Safety and Health (hereinafter OSHA).

Following this trial, I issued findings of fact that Dynamic Auto Images, Inc. (hereinafter Dynamic) did not engage in serious and willful misconduct in connection with the applicant's death. I ordered, solely with regard to the serious and willful misconduct claim, that the prosecuting dependents take nothing further. The within reconsideration petition followed, brought by dependent Susana Trejo-Moreno, both in her individual capacity and as guardian ad litem for two other dependents, Natalie Perez and Jacqueline Perez.

Testimony of Defense Witness Robert Zingg

As noted above, Mr. Zingg was the sole testifying witness at trial. He testified telephonically on both trial days by agreement of all parties in light of the COVID-19 pandemic.

On direct examination, Mr. Zingg stated that he was the business manager for Dynamic. The defendant corporation itself was in the business of doing new and used car "prep work" on behalf of car dealerships. Dynamic, per Mr. Zingg's testimony, was a large company with almost 60 separate locations at the time of the applicant's death.

According to Mr. Zingg, Dynamic was run by a management team, consisting of five individuals. These were owner Tom Miller; the owner's son, Corey Miller, who was a vice-president who was in charge of staffing and locations; John Dalpe, a manager in charge of business development; the witness, who was a business manager handling "matters related to general insurance, etc." and the applicant, who was Dynamic's operations manager.

As operations manager, the applicant's duties, per witness Zingg, "covered anything operationally that could happen to a collision center or dealership. Much of the applicant's duties were equipment related such as having to do with hoses, step-ladders, towels, etc., anything operational that needed attention." (MOH, pp. 6-7.)

The applicant was rarely at his base office in Garden Grove as he was usually in the field. Per Mr. Zingg, "they gave the applicant Home Depot cards and other similar items so the applicant would have the things he needed to get the job done." (MOH, p. 7, lines 9-10.)

According to Mr. Zingg's testimony, defendant hired the applicant was hired 17 years ago. (The personnel records admitted as Exhibit 2 gave his hire date as 3/7/01, almost 16 years before the accident in question.) According to Mr. Zingg, the applicant only supervised one employee, who has working with the applicant on said employee's first day on the job when the applicant's fatal accident occurred.

Mr. Zingg testified that the company held safety meetings "at least twice a month." The defendant also contracted with another company, Toolbox Safety that gave regular safety training to the company's employees. In particular, Mr. Zingg testified to an email placed in evidence as Exh. C which documented that the applicant participated in slip and fall training through the employer in January, 2016, one month before his fatal injury. (See 3/1/21 MOH, p. 6.)

Mr. Zingg also testified to a personnel document titled "Company & Employee Safety Responsibilities" which stated in relevant part, "If an employee has any questions about how a task should be done safely, he or she is under instruction NOT to begin the task until they discuss the situation with their supervisor and/or Robert Zingg. [Par.] NO EMPLOYEE IS EVER REQUIRED to perform work that he or she believes is unsafe, or that he or she thinks is likely to cause injury or a health risk to themselves or others." (Exh. A.) According to Mr. Zingg, the applicant could contact others on the executive committee with any safety questions. Applicant could have also consulted with a second outside company, "EEAP," who would provide information regarding safety issues and applicable OSHA guidelines. (MOH, 3/1/21C at p. 6.)

As documented in the OSHA records discussed below, the fatal accident in question happened when the applicant fell about 12 feet from off the roof of the carport that he was working on and apparently landed on his head.

Mr. Zingg testified that he found out about the accident late in the day it occurred and went to the scene of the accident at a Dynamic shop in Victorville the next day. While there, Zingg spoke to an OSHA investigator and advised the investigator that "that the company had no idea of any of the probable consequences of what the applicant was doing and no control on what the applicant decided to do and that the applicant did not check with the company." (MOH, 3/1/21, p. 8, lines 23-25.)

On cross-examination, Mr. Zingg testified that, prior to the accident, the company's owner, Tom Miller, had decided to close the Victorville facility. Mr. Miller announced this decision at a meeting of the aforementioned management team. That meant that the company would remove all the fixtures that Dynamic installed when Dynamic leased the building, including the carport.

Mr. Zingg disputed that other members of the management team instructed the applicant to remove the carport either at this meeting or at any later date. Mr. Zingg instead asserted that, as the company's operations manager, the applicant knew that removing fixtures such as carports was part of his responsibility whenever a shop closed. According to Mr. Zingg, there was no specific discussion of removing the carport at this meeting, or even of applicant going to Victorville to remove the carport, as "it was understood" that this was part of the applicant's duties. (MOH, 3/1/21, pp. 9-10.)

On direct examination, Mr. Zingg was asked if he had formed an opinion as to "what happened and things that should have been changed." Mr. Zingg observed in response that the applicant had rented a seven-ton truck on his own to assist in the dismantling. Mr. Zingg further stated, per my summary of evidence, that "he does not know why the applicant did not also rent safety fall protection equipment or a scissor lift to assist in carrying out this job. The witness believes that the way the applicant was going about it, clearly wasn't up to OSHA policy or code. The witness states that those decisions were made by the applicant and, to this day, the witness does not understand why the applicant would make such decisions." (MOH, 3/1/21, p. 8, lines 8-14.)

Mr. Zingg acknowledged that OSHA initially imposed fines of $58,000.00 based on safety violations disclosed in connection with OSHA's investigation. He noted that the company filed a formal appeal, after which the fines were reduced to $21,000.00. (Mr. Zingg provided these figures in his testimony. (Id. at p. 9, lines 2-5.) As noted in the documents presented at trial, these reduced fines were part of the company's stipulated settlement with OSHA, which provided in relevant part that 1) "the settlement terms and conditions are not intended to be and shall not be construed by anyone or any proceeding as an admission of negligence, fault, or wrongdoing whatsoever by employer;" 2)"no findings or conclusions have been made by any trier-of-fact regarding the citations and fines at issue herein, unless otherwise specified below,"; 3) "neither employer's agreement to compromise this matter nor any statement contained in this agreement shall be admissible in any other proceeding, either legal, equitable, or administrative . . . .."

Documents re OSHA Investigation

Other than as discussed above, documentary evidence in this case pertained mainly to the OSHA investigation that followed the applicant's death, as well as the imposition of fines by OSHA against defendant and the subsequent settlement of the OSHA claim. (See generally, Exhs. 1, 5, 7 and B.)

These records showed that the OSHA investigator interviewed several individuals, including witness Zingg and Miguel Cruz, the applicant's sole supervisee who, on his first day on the job, assisted applicant in dismantling the carport.

Per the investigator's report, just before the accident, the applicant was on the roof of the carport, which was about twelve feet off the ground. Applicant and his coworker accessed this carport roof by parking a flatbed rental truck next to the carport and placing a six-foot ladder on the bed of the truck. The truck bed itself was about four feet off the ground. Apparently, both men used this jury-rigged system to also transport heavy tools up and down from the carport, and dismantle and remove various pieces from the carport.

At around 3:55 pm the applicant fell from the roof. Mr. Cruz did not see the fall but did find the applicant on the ground. The applicant was taken to Desert Valley Hospital where he died later the same day.

OSHA initially assessed a series of fines totaling $45,000.00 for a number of "serious" violations of safety regulations. These included findings that the employer "failed to ensure" compliance with a number of safety regulations, including lack of provision of a fall protection system, use of a ladder that was too short to reach the work area, unsafe of this ladder, and failure to prove that decedent had sufficient training in ladder use.

As noted above, defense witness Zingg gave unrebutted testimony that defendant filed a "formal appeal" from the initial imposition of fines. (The actual appeal document was not included in the documentary record herein.) The outcome of this appeal was the 10/5/17 settlement order discussed above, by which the fines were reduced to $21,800.00 and the parties entered into a multi-factorial "non-admissions clause" as noted above.

III
DISCUSSION

A. Reasons Set forth in my Opinion on Decision for Rejecting the S&W Claim

In my opinion on decision, I gave reasons as set forth below for finding in defendant's favor on the serious and willful misconduct claim. Because I believe that this discussion is quite germane to petitioners' current contentions on reconsideration, I am including this discussion in my report as follows:

> Labor Code section 4453 generally provides that a corporate employer is liable for substantial additional benefits where the injury in question was caused by the serious and willful misconduct of 'an executive, managing partner or general superintendent thereof.' The law appears to provide at least two separate paths to recovery of this benefit.
>
> "The first is that the circumstances of the injury, taken as a whole, reasonably support the conclusion that the named executive, managing partner or general superintendent engaged in conduct properly characterized as serious and willful misconduct. In the leading case of *Mercer-Fraser Co. v. Industrial Acc. Com.* (*Soden*) (1953) 18 Cal.Comp.Cases 3, the California Supreme Court defined generally the

standard of care involved in a claim of serious and willful misconduct of an employer. The requisite misconduct may consist of: (1) a deliberate act for the purpose of injuring another; (2) an intentional act with knowledge that serious injury is a probable result; or (3) an intentional act with a positive and reckless disregard for the safety of another.

"In meeting their burden of proof under these standards, the six moving parties have a number of problems.

"First, they never specifically identified which executive, managing partner or general superintendent (other than the decedent himself) engaged in conduct that is fairly described under the Mercer-Fraser standards enunciated above.

"Perhaps the dependents' theory is that owner Tom Miller and/or each member of the management team engaged in such conduct. However, I find no credible support for such an assertion in the record.

"As was well-established at trial, the decedent himself was an 'executive, managing partner or general superintendent' with a great deal of autonomy in performing his job duties. His job title as listed on virtually every document, including his death certificate, was 'Operations Manager.' He was a sixteen-year employee. It was not clear whether he spent all this time as an operations manager but my overall impression is that he was hardly new to the job.

"Much was made of the fact that a meeting took place among the management team where this team discussed the fact that they were closing down the company's Victorville facility. At this meeting, the company's owner and others made clear that the applicant would be in charge of the physical logistics regarding this project. This included removing fixtures such as carports that belonged to the defendant rather than the lessor. The moving parties' theory seems to be that it was incumbent on the rest of the management team to make sure that the applicant carried out this activity in full compliance with applicable safety regulations. However, the moving parties have cited no authority that other management team members were legally required to micro-manage the activities of an executive officer who had broad autonomy to carry out his position as 'operations manager' in the best manner he saw fit.

"As my colleague, Judge Harwayne, wrote in *Clemente v. NexColl, Inc*. 2009 Cal.Wrk.Comp.P.D. LEXIS 253, 'The general theory of failure to provide a safe place to work may refer to a particular unsafe practice or condition that causes the injury to occur. An injured employee must prove that the employer: (i) actually knew of the dangerous condition; (ii) knew that the probable consequences of its continuance would involve serious injury to an employee; and (iii) deliberately failed to take action.'

"Here the moving parties have not presented proof of any of these elements. The defendant simply assigned the applicant to do the work he

normally did on a day-to-day basis at one of the company's many facilities. There is no evidence that any other member of the management team had any knowledge that the applicant would go about doing these activities in an unsafe way. Mr. Zingg credibly testified that the applicant had the autonomy to rent a seven ton truck on his own, which he did, and also had the autonomy to rent a scissor lift or fall equipment that might have prevented the accident. Mr. Zingg was also credible in asserting that said witness was genuinely bewildered as to why the applicant did not take these steps. (See MOH, 3/1/21, p. 8, lines 7-14.)

"Perhaps the moving parties are proceeding on some sort of theory of negligent hiring or negligent retention of the applicant to carry out the project that the applicant was assigned to carry out. Even this would not appear to rise to the level of serious and willful misconduct.

"However, assuming arguendo that this is their theory, the moving parties have no evidence to support this. There was no indication whatsoever that the applicant had a history of safety issues or other personnel issues or had any past track record of safety order or safety policy violations. In fact, there was unrebutted evidence that the company had regular safety meetings and safety training and was somewhat pushy about making sure managers and employees participated in these. A notable example is that the applicant was required to sign off on completion of a safety program specifically designed to prevent slip and fall injuries less than two months before his fatal injury.

"A second and long-recognized path to recovery of serious and willful misconduct benefits is via proof of corporate officer or manager's deliberate or reckless violation of a regulation such as an OSHA safety order. This manner of meeting the burden of proof appears to have its origin in such California Supreme Court cases as *Parkhust v. IAC*, 7 CCC 228, in which Justice Traynor wrote, '"Where there is a deliberate breach of a law . . ., which is framed in the interests of the working man, it will be held that such a breach . . . amounts to serious misconduct." So spoke the court in *Fidelity etc. Co. v. Industrial Acc. Com.*, 171 Cal. 728 . . ., annulling an award based on a finding that an employee whose injury resulted from a violation of speed laws was not guilty of serious and willful misconduct. The rule must be similarly applied to the conduct of an employer.'

"However, after the court's decision in *Parkview* and other similar cases, the Legislature took steps to limit this doctrine in 1959 by passing Labor Code section 4453.1, which makes it clear that violation of a safety order, in and of itself, does not equate to a compensable claim for serious and willful misconduct. More specifically, section 4453.1 provides:

> "'In order to support a holding of serious and willful misconduct by an employer based upon violation of a safety

order, the appeals board must specifically find all of the following:

"'(1) The specific manner in which the order was violated.

"'(2) That the violation of the safety order did proximately cause the injury or death, and the specific manner in which the violation constituted the proximate cause.

"'(3) That the safety order, and the conditions making the safety order applicable, were known to, and violated by, a particular named person, either the employer, or a representative designated by Section 4553, or that the condition making the safety order applicable was obvious, created a probability of serious injury, and that the failure of the employer, or a representative designated by Section 4553, to correct the condition constituted a reckless disregard for the probable consequences.'

"I need not discuss in detail whether or not the moving parties met their burden of proof as to elements (1) and (2) above. Obviously, the moving parties have a reasonably strong argument that they did. However, even if I assume for the sake of argument that they have satisfied the first two elements of section 4453.1, they cannot meet the third element, namely, requisite knowledge of a safety order violation or likely safety order violation on the part of any designated employer representative.

"As I noted in my discussion above, no other member of the management team knew either that decedent would carry out project in an unsafe way or had any palpable reason to believe that he would do so. . . .

"The present matter I believe is similar to *Rosas v. Hovenier, Inc*., 2018 Cal.Wrk.Comp.P.D. LEXIS 466. In that case, the applicant contended that her serious injuries were compensable under section 4553 because of acknowledged safety order violations on the part of the defendant. In rejecting this claim (and later being upheld by the Board panel), my colleague Judge DeWeese stated as follows in his report on reconsideration:

"'[A]pplicant's position appears to be that violation of a safety order under conditions making that order applicable constitutes per se serious and willful misconduct as a matter of law as long as the "qualifying named individual" is aware of he order and its applicability in the given circumstances.

"'This judge is not convinced that the question is that simple. . . . [A] finding of serious and willful misconduct as a matter of law based on the violation of an applicable safety order even in the absence of the employer's knowledge of the violation would render the concept of serious and willful misconduct, and the reason for the substantial financial

> consequences attached to it, meaningless. It is well-established law that serious and willful misconduct is more than negligence, and more even than gross negligence. It is conduct of a "quasi-criminal nature" that involves the intentional doing of something with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences. . . . .
>
> "'If petitioner's view of the law were to prevail, [defendant] would be found to have engaged in serious and willful misconduct even if a "qualifying named individual" did not know that a known and applicable safety regulation was violated. That would turn section 4553.1 into a strict liability statute that could impose harsh penalties on an employer even in circumstances that may not rise to the level of negligence, much less the "quasi-criminal" intentional or reckless conduct contemplated by the serious and willful statutory scheme. This court does not believe the law intends that serious and willful misconduct be found in such cases.' (See also *Bosell v. WCAB*, 67 CCC 447; *Clemente v. NexColl, Inc*. 2009 Cal.Wrk.Comp.P.D. LEXIS 253 [S&W claims rejected notwithstanding OSHA safety order violations where element of employer knowledge was not proven].)

"It could perhaps be argued that the repeated findings of the initial OSHA investigator that the employer 'failed to ensure' against the safety order violations have some sort of res judicata or collateral estoppel effect on the WCAB and compel a finding of employer knowledge regardless of any other evidence presented at trial. However, there are a series of problems with this type of argument.

"First, there is no showing that the OSHA investigator's determination that the corporation 'failed to ensure' compliance with the arguably breached safety orders was based on the same legal standards as the stringent, quasi-criminal standards of culpable knowledge in serious and willful misconduct claims which are discussed above.

"Second, at a minimum there is a significant issue as to privity of the parties in the OSHA proceedings and in the present case where the moving party in the OSHA case was a state agency and, in the present case, dependents of the deceased. (See, e.g., *Mooney v. Caspari,* 138 Cal.App. 4th 704.)

"Third, the moving parties cannot identify any final finding in the OSHA case that could collaterally estop any of Dynamic Auto Images' defenses herein. (See, e.g. *People v. Sims* (1982) 32 Cal. 3d 468, 486.)

"While the moving parties appeared to place much emphasis at trial on the initial findings of the OSHA investigator, it appears that defendant perfected a timely appeal of these findings. The ultimate

outcome of these proceedings was the 10/5/17 settlement order which clearly states that the 'settlement terms and conditions are not intended to be and shall not be construed by anyone or any proceeding as an admission of negligence, fault, or wrongdoing whatsoever by employer.' This agreement also provides that, 'neither employer's agreement to compromise this matter nor any statement contained in this agreement shall be admissible in any other proceeding, either legal, [or] equitable . . . .' Defendant is entitled to the benefit of this bargain.

"The only other basis on which I can posit entitlement to section 4553 benefits would be that the safety order violations arguably committed by the decedent himself could lead to an increased recovery, as he was an 'an executive, managing partner or general superintendent' of defendant within the meaning of section 4453(c). However, I submit this would be an absurd interpretation of this statute that the Legislature clearly did not intend. Such an interpretation would simply reward injured workers who happen to be management employees for engaging in reckless or deliberate misconduct.

"In again reviewing the S&W petitions filed by the moving parties, I am seeing many conclusory statements that the defendant knew of the asserted safety order violations or acted with reckless disregard of the likelihood of these claimed violations. There is also an assertion that the employer imprudently expedited the project at the expense of decedent's safety. However, there is scant support for these contentions in the evidence actually presented at trial.

"I do appreciate the tragic circumstances of Mr. Perez's sudden and untimely demise, as well as the liability concerns arising from settlement of the OSHA claim at a substantial figure. However, for the reasons discussed above, these two events alone are not sufficient to meet the moving parties' burden of proof of knowledgeable and quasi-criminal conduct on the part of other members of the management team." (Opn. on Decision, pp. 2-8.)

B. Further Response to Additional Contentions on Reconsideration

While I believe my opinion on decision quoted above is largely responsive to petitioners' contentions on reconsideration, I believe it is also reasonable for me to separately respond in this report to some of petitioner's additional contentions.

The centerpiece of petitioners' argument appears to be a hearsay statement attributed to Mr. Zingg in the OSHA interviews discussed above that "Robert [Zingg] stated there are no procedures for [removal and replacement] of a hard canopy and it is done up to three times a year." Interestingly, petitioner's same attorney never asked Mr. Zingg about this statement attributed to him during counsel's extensive cross-examination of Mr. Zingg at trial.

Taking Mr. Zingg's hearsay statement at face value, I am not seeing where this sort of admission amounts to a quasi-criminal form of serious and willful misconduct.

I would readily agree that if supervisee Miguel Cruz had been injured rather than the applicant, Mr. Cruz would have had a very strong serious and willful misconduct claim naming the applicant as the responsible company official. Tragically, however, it was the operations manager himself who failed to follow better practices in carrying out this type of ongoing activity that was squarely within the scope of the operations manager's own supervision.

Petitioners' argument regarding the statement attributed to Mr. Zingg is largely a restatement of the rejected theory I proposed in my opinion on decision quoted above. This was that the serious and willful misconduct of decedent himself as operations manual could be bootstrapped into a successful S&W claim. Arguably, it was incumbent on decedent to develop appropriate safe procedures for the recurring activity of carport removal. However, petitioners have not shown that *other managers of different departments* committed quasi-criminal misconduct by not micro-managing all of the applicant's own executive functions as operations manager.

The applicant's plenary control over activities such as carport removal was never disputed at trial. In fact, there was unrebutted testimony that when the management team announced the closing of the Victorville facility, the management team did not even discuss carport removal. It was simply understood that the applicant was responsible for arranging to remove all of the fixtures.

Taking petitioners' argument at face value, perhaps other members of the management team should have also made sure that they put procedures in place for all of the applicant's other activities, such as driving cars and trucks, renting various types of equipment, handling air hoses, etc. Petitioners have cited no authority that the law expects this of the other management team members, or that failure to do so was a quasi-criminal act on the part of Mr. Zingg.

Perhaps if there was evidence the applicant had a poor safety record, some palpable argument could be made along these lines. However, no such evidence emerged at trial. Mr. Zingg provided evidence that the company had safety meetings twice a month and regularly enlisted the help of two different outside companies to provide safety education and assure compliance with OSHA rules and other safety standards. I believe that this is all that one could reasonably expect of Mr. Zingg in terms of policing the applicant's own role as a manager of a separate department. Viewed as a whole, I am not seeing how Mr. Zingg acted in a quasi-criminal manner by not taking it upon himself to oversee all the operations of the operations manager.

With regard to the OSHA records, I dispute that I ever asserted that the OSHA records "should not be considered evidence of wrongdoing and should not be admissible . . . ." Obviously, these records were admitted at trial herein and I reviewed them in their entirely. Part of these records, of course, were the clauses in the settlement letter that "no findings of fact have been made by any trier of fact regarding the citations and fines at issue herein . . . ." Accordingly, I gave little weight to the preliminary conclusions of the OSHA investigator and instead focused on the underlying factual information contained in the records regarding both the circumstances of the accident itself and the applicable safety standards. I strongly believe that the parties herein are entitled to decisions based on my own interpretation

of the facts and the law rather than what another investigator may have concluded in another proceeding that has no collateral estoppel effect.

Finally, petitioner appears to assert the WCAB should "liberally construe these records to be evidence that the employer, through its business manager, Mr. Zingg, filed [sic] to have in place a procedure to use appropriate ladders and to prevent falls while removing canopies . . . ." Obviously, liberal construction does not apply to the underlying facts, as nothing in Labor Code section 3202 relieves petitioners of their burden of proving their S&W claim by a preponderance of the evidence. (LC sec. 3202.5) If petitioners are simply asserting liberal construction of the law, they have presented no precedent for interpreting the law to make one department manager's failure to police the activities of another manager of an entirely separate department into a quasi-criminal act.

IV
RECOMMENDATION

It is respectfully recommended that the dependent petitioners' reconsideration petition be denied.

Respectfully submitted,

Dated: August 10, 2021

Daniel Dobrin
Workers' Compensation Judge