WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CARLOS FLORES, *Applicant*

vs.

COUNTY OF LOS ANGELES, SHERIFF'S DEPARTMENT, permissibly self-insured, administered by SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ9744073
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant County of Los Angeles seeks reconsideration of the March 8, 2022 Findings of Fact, Award, and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant Carlos Flores sustained injury as a result of the serious and willful misconduct of his employer.

Defendant contends that applicant failed to prove that Deputy Hines, the person who instructed applicant to patrol the park using an all-terrain vehicle (ATV), was a managing representative of defendant. Defendant further contends that it did not know of applicant's inability to operate an ATV because applicant did not express his discomfort of riding an ATV to a managing representative, having only expressed such discomfort to Deputy Hines. Similarly, defendant contends that it was not aware that applicant did not have a helmet as applicant did not request a helmet from a managing representative, having requested it from Deputy Hines. Defendant further contends that it did not know that applicant would move locations to obtain better surveillance of suspicious activity because it did not order him to do so. Finally, defendant contends that applicant did not satisfy the elements of Labor Code section 4553.1.

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

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, except for the first paragraph under section 4 on p. 11, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant County of Los Angeles's Petition for Reconsideration of the March 8, 2022 Findings of Fact, Award, and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 27, 2022

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

CARLOS FLORES
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE, LLP
BOLEN & ASSOCIATES

LSM/*pc*

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

REPORT AND RECOMMENDATION ON DEFENDANT'S PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Date of Injury October 10, 2014.

2. Identity of Petitioner Defendant filed the Petition.
   Timeliness: The Petition is timely filed.
   Verification: The Petition is verified.

3. Date of Findings of Fact 3/8/2022

4. Petitioner's contentions:
(a) The evidence does not justify the findings of fact.
(b) The findings of fact does not support the Order, Decision or Award.
(c) By Order, Decision and Award the Appeals Board has acted without or in excess of its power.

II
FACTS

Applicant filed an Application for Adjudication of Claim on October 29, 2014. (EAMS Doc. ID# 54664167).[1] Applicant then filed a Petition for Serious and Willful Misconduct dated July 8, 2015. (Joint Exhibit "O"). Subsequent to this date, an amended Petition for Serious and Willful Misconduct dated August 7, 2015, was filed. (Joint Exhibit "P"). The Petitions assert, inter alia, violations of General Industry Safety Orders ("GISO") otherwise known as CAL/OSHA regulations specifically failure to comply with the Injury and Illness Prevention Program. Defendant issued an Answer to the Petition dated September 1, 2015, denying all allegations laid forth within Applicant's Petition. (Joint Exhibit "Q"). The case settled via Award pursuant to Stipulation with Request for Award on September 12, 2017. (EAMS Doc. IDs# 64872996; 64872997). On January 25, 2022, the parties proceed to trial on whether Defendant was liable for serious and willful misconduct.[2]

Applicant, a deputy sheriff, employed by the County of Los Angeles on the date of injury herein was dispatched to Bonelli Park on an ATV without protective gear, or training. (Depo. of Carlos Flores, 2/23/2021, Joint Exhibit "N" at p. 17:2-5). He had never been assigned to this park before. (Id. at 17:15-

[1] While the Application and settlement documents were not listed as exhibits by the parties, the court takes judicial notice of the pleadings pursuant to Evidence Code 452(d); Faulkner v. WCAB (2004) 69 CCC 1161 (writ denied) (permitting judicial notice of the DWC-1); *see also Herrera v. University of California San Francisco*, 2013 Cal. Wrk. Comp. P.D. LEXIS 553 (allowing judicial notice of EAMS file).
[2] The issue of serious and willful misconduct by the Applicant was also raised and heard at the trial.

17). His general assignment was to the Park Services Bureau where he patrolled other parks in a patrol vehicle. (*Id.* at 18:1-23). On the morning of his injury, he arrived at his regular assignment, Whittier Narrows Park, and changed into his uniform. (*Id*. at 23:12-15). He and other deputies were ordered to meet at the Emergency Operations Center Command Post at Bonelli Park for further instructions. (*Id*. at 23:17-20; 24:1-4). When they arrived at the Emergency Operations Center, they were instructed to standby and that the assigned sergeant would be out soon. (*Id*. at 24:7-11). Shortly after, the sergeant showed up and assigned the operations plan. (*Id*. at 24:12-15). He initially did not recall the name of his supervisor or commanding officer stating that he was a sergeant he had never worked with before, (*Id*. at 19:22-25) but later in his deposition testified that he believed his name was Hines but was not 100% sure of the name. (*Id.* at 26:1-5). His regular supervisor during the period 2014 until 2016 was Sergeant Ingrid Jeffreys. (*Id*. at 20:10-12). He had never ridden on an ATV. (Id. at 25:13-14). When he received his assignment, he expressed that he was uncomfortable riding the ATV to the sergeant but was told the plan would not change and believed the underlying message to him was to be subordinate. (*Id*. at 25:23-25; 26:1-5; 26:22-25; 27:1-16). He believed that if he refused to ride the ATV, he would have been terminated or subject to other disciplinary action. (*Id*. at 32:6-14). He asked the other members in his group how to turn on the ATV and move back and forth. (*Id*. at 28:13-17; 30:16-17).

At trial, Applicant testified that the special assignment at Bonelli Park was to assist with the visit of former President Obama. (Minutes of Hearing/Summary of Evidence "MOH/SOE", at p. 3:20-22). He identified the sergeant at Bonelli Park as Sergeant Hines the team leader for the event who gave him his orders and assignment. (*Id*. at 3:23-25; 6:7-8). At trial, he again testified that he had never operated an ATV prior to this date. (*Id*. at 3:24-25). He told Hines that he had never operated an ATV and was uncomfortable with the assignment. (*Id*. at 4:3-5). Hines told him that it was too late to change the operations plan. (*Id*.). There were other officers patrolling the park by car and horseback. (*Id*. at 5:15-16). The employer never gave him any training, and he had to ask his coworkers how to move the ATV forward and back which was accomplished in about a minute. (*Id*. at 4:7-9). Yet, he still felt only minimally able to operate the ATV. (*Id*. at 4:6-8). He asked his sergeant for a helmet, but was not provided with any personal protective equipment ("PPE"). (*Id*. at 5:1-2; 4:8-9).

While at Bonelli Park, there was a report of suspicious activity that stopped former President Obama's motorcade. (*Id*. at 4:10-15). He moved from his position to a lower position overviewing the park so he could see the uncovered section that the other groups of deputies were approaching in a containment-type position. (*Id*. at 14:15-17, *see also Depo. supra* at p. 41:3-7). Although no one explicitly asked him to move, he believed he had a duty to investigate and that he was supplementing the protection of former President Obama. (MOH/SOE at p. 5:19-25). While driving back from this location, he

was tossed off the ATV landing on his head and was injured. (*Id*. at 4:16-17). He was air lifted to the hospital. (*Id.* at 4:18-19). Applicant was the only witness at trial.

The parties were given leave to file a Memorandum of Points and Authority by February 7, 2022. Applicant counsel filed a brief reiterating allegations made within his Petition for Serious & Willful to wit, violation of Labor Code sections 4553 and 4553.1 specifically violation of safety order 3203(a)(7)(c). Defendant in its brief argued that Defendant's actions did not rise to the level of serious and willful, the employer did not have knowledge of a dangerous condition or deliberately fail to act, and that Applicant failed to establish that the actions taken on October 10, 2014, were at the behest of the employer. Defendant for the first time in its trial brief provided a work log to support that Hines was not a supervising sergeant but rather a deputy; therefore, not an employer, supervisor, or managing representative.

III
DISCUSSION

Defendant's Petition for Reconsideration raises the following issues: 1) Applicant did not meet his burden of proof that Hines was a supervisor or managing representative; 2) Applicant did not prove that the employer knew of a dangerous condition; 3) There was insufficient evidence to establish that the employer failed to take corrective action; & 4) The requirements of Labor Code section 4553.1 were not satisfied.

1. HINES WAS AN EMPLOYER, SUPERVISOR OR MANAGING REPRESENTATIVE

a. Failure to Raise Issue

Defendant argues that the undersigned erred in requiring Defendant to raise the issue of employer involvement in the Pre-Trial Conference Statement, MSC or during trial. Defendant appears to be arguing that the burden of establishing serious and willful misconduct against the employer lies with the injured employee. However, the undersigned's comment in this regard, as expressed in the Findings & Award ("F&A") related not to Applicant's burden of proof, but rather to Defendant's attempt to provide rebuttal evidence subsequent to the close of trial. Pursuant to the F&A, this WCJ found that Applicant satisfied his burden of proof inclusive of Labor Code section 4553 based on his unrebutted and credible testimony at trial. Once Applicant met his burden of proof, the burden shifted to Defendant to rebut Applicant's testimony. Defendant's first attempt to rebut Applicant's testimony regarding Hines position or authority was in its post-trial brief (EAMS Doc. ID# 40040665) wherein Defendant attached a work roster from October 10, 2014.

In its Petition for Reconsideration, Defendant argues that because Hines was a deputy and not a sergeant, he was not a managing representative and there was no evidence to show that as a deputy, Hines had discretionary power and control. Here, Defendant was on notice at least on the date of Applicant's deposition of February 23, 2021, that Applicant referred to his supervising sergeant for the day as Sergeant Hines. As the employer, Defendant was also best situated to identify and provide the name of the supervising officers as demonstrated by the recent filing of the work roster. Defendant, however, failed to do so at any time prior to and up to the conclusion of trial. As stated in the F&A, this issue and exhibit should have been raised no later than at the MSC and/or at the time of trial as rebuttal evidence.

b. Trial Briefs and Attached Exhibits are not Evidence

In support of admissibility of the work roster, Defendant argues that the record did not close until submittal of trial briefs making the trial brief and attached exhibit part of the record. Defendant's reliance on admissibility of evidence through trial briefs is unavailing. Trial briefs are not evidence, but rather are intended to assist the Workers' Compensation Judge ("WCJ") in understanding evidence and providing legal research on a subject. *See Liebensperger v. WCAB*, 60 Cal. Comp. Cases 506. A party may not rely on evidence that was not disclosed at the Mandatory Settlement Conference ("MSC") in a brief. *See* generally *Zamora v. State of CA. Dept. of Corrections*, 2016 Cal. Wrk. Comp. P.D. LEXIS 581, fn. 4 (refusing to verify a statement because the report was never properly admitted into the evidence). Therefore while Defendant is free to expound about the elements for serious and willful, case law, or other related material, it may not introduce new evidence through a trial brief.

c. Applicant was not Impeached

Defendant argues that in assessing the Applicant's credibility, this WCJ did not address the fact that Applicant was impeached regarding his lack of knowledge of his supervisor's name at trial. Impeachment evidence rests within the sound discretion of the trial court. In his deposition, when asked the name of his commanding officer or supervisor, Applicant testified that he was a sergeant but that he had never worked with him before since this was a special operation. Later upon further probing on the same question, he testified that he believed that the sergeant overseeing the operations was named Hines but was not 100% sure of the name. There was no ambiguity or uncertainty as to Hines' rank or supervisory authority. At the time of trial, which occurred approximately eleven months after the deposition, Applicant credibly identified his supervisor for the special operations as Sergeant Hines. Defendant's attempt at impeachment relies primarily on Applicant's memory at the time of the deposition. The relevance of his inability to recollect the last name of the sergeant given the facts of this case as impeachment evidence is thus opaque.

The undersigned does not find that this constitutes sufficient evidence to call into question the Applicant's integrity or validity of his testimony.

d. Hines was an Employer, or Managing Representative

The Labor Code limits the class of individuals whose misconduct will result in imposition of additional compensation. Labor Code section 4553 provides that an employer is liable for increased compensation for serious and willful misconduct only if the misconduct is committed by:

1. the employer, or his managing representative;
2. the employer, if he or she is a partnership, on the part of one of the partners, a managing representative or general superintendent;
3. the employer, if it is a corporation, on the part of an executive, managing officer or general superintendent. Labor Code §4553.

Whether an employee is a managing representative is a mixed question of fact and law. Defendant is not arguing that had Hines been a sergeant, that he would have been acting as a managing representative but rather than Hines was not a sergeant and held no general discretionary authority. However as discussed *supra*, this fact was never rebutted at trial. Any attempts to introduce this evidence subsequent to the close of trial is inadmissible and would be an attack on the issue of Applicant's credible testimony upon which this WCJ relied upon at the time of trial. However, for the sake of argument, it has previously been held that the question of authority is not limited to the title bestowed on the employee. *Bechtel v. IAC*, 9 Cal. Comp. Cases 296, 299. A "managing agent or managing representative is one . . . who may *direct, control*, conduct or carry on his employer's business *or any part of branch thereof*." *Id.* at 298 quoting *Gordon v. IAC*, 199 Cal. 420, 427 (emphasis added).

A sheriff's department is not akin to a civilian organization, corporation, or partnership. Decisions have to be made in split seconds and the stakes are much higher. When Applicant reported to work on the date of injury, he was directed to meet at the Emergency Center Command Post at Bonelli Park for further instructions. Upon his arrival at Bonelli Park, he was told that the assigned sergeant would be coming out to talk to the team. When Applicant expressed his concern about not knowing how to operate an ATV, Hines told him the operations plan would not change. Hines was in charge of this section of the special mission and led the employers business for the day. He directed the deputies' work, exercised control in giving out assignments, and declined to change the plan or provide PPE. Given these facts, even arguendo not bestowed with the title of sergeant, Hines was overtly and impliedly operating with general discretionary powers of direction and control for this mission.

2. <u>KNOWLEDGE OF A DANGEROUS CONDITION</u>

a. Defendant's Conduct, Amounts to More than Mere Negligence or Gross Negligence

Defendant argues that the F&A established an act of negligence or perhaps gross negligence but failed to state how the employer's conduct was quasi-criminal. The Supreme Court in *Mercer-Fraser* stated that "while the line between gross negligence and wilful [sic] 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 willful 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.*" *Mercer-Fraser Co. v. IAC*, (*Soden*) 18 Cal. Comp. Cases 3, 11-12 (emphasis added). Going on further, the court notes that "[w]hile the word 'willful' implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done." *Id*. at 12.

In *Hawaiian Pineapple Co., Ltd*., the court reinforced this definition of serious and willful misconduct holding that "the conduct must be with knowledge of the peril to be apprehended, or done with a positive and active disregard of the consequences." *Hawaiian Pineapple Co. v. Industrial Acci. Com*., (*Churchill*) 18 Cal. Comp. Cases 94, 97. A finding that the " 'employer knew or should have known had he put his mind to it' does not constitute a finding that the employer had that degree of knowledge of the consequences of his act that would make his conduct wilful [sic]. Id. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is *esteemed to be the equivalent of actual knowledge*, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. . . ." *Mercer-Fraser Co. supra* at 23. Later, the court issued the decision of *Keeley* but did not alter the definition of serious and willful misconduct established in *Soden* and *Churchill* supra, but perhaps relaxed the requisite level of conduct needed for a serious and willful misconduct claim holding that a serious and willful misconduct is involved when "the employer knowingly places the employee in a situation of obvious danger and takes no precautions to protect him or her." *Keeley v. IAC*, (*Henry*) 26 Cal. Comp. Cases 15, 19-20.

While it would certainly be probative to have an employer on the stand to determine what the employer had put his mind to, it is not required nor dispositive. This determination can be made from the facts of the case. Had Applicant not expressed his lack of training, discomfort and requested PPE, the employers conduct may perhaps have simply amounted to a passive or indifferent attitude, but the moment that knowledge of Applicant's concerns were relayed to Hines and disregarded, the conduct rose to the level of disregard for its consequences so to say, serious and willful. Moreover, in this case, we are not dealing with your average employer, but rather an employer that is more sophisticated and should have been very knowledgeable about the danger to be apprehended from its failure to provide training and PPE. The Sheriff's

department is tasked with enforcing the law and likely a first responder for ATV related-type of accidents. The employer had a myriad of options when Applicant expressed his concern including excusing the Applicant from the assignment, reassigning the Applicant, and at a minimum providing PPE. However, the employer chose to continue with the assignment and failed to take any precautions to prevent injury.

b. Applicant was Required to Respond to the Suspicious Activity

Defendant argues that it had no idea Applicant would take it upon himself to leave his post to get a better look at what was going on that day. In other words, had Applicant not reacted to the call about suspicious activity, he would not have been injured. The court need not pause long on this issue. At trial, Defendant proffered a similar line of questioning suggesting that Applicant could simply have remained dormant and should not have responded to the existing threat since his supervisor never explicitly ordered him to act. This argument is incongruous and suggests that in the face of danger, a sheriff should not exercise best judgment. It is highly unlikely that with the split second decisions that need to be made in this line of work, that one would simply remain dormant and fail to act absent an explicit call or order from a supervisor. The undersigned further believes that inaction by a sheriff could potentially result in serious injury or death and perhaps disciplinary action. Finally, the Applicant testified that he has latitude when it comes to protection of the public, believed he had a duty to act, and believed that his action was necessary for the protection and safety of the former president.

3. EMPLOYER FAILED TO TAKE CORRECTIVE ACTION

Defendant argues in its Petition for Reconsideration that the Applicant was given training and relies on language within the F&A to support the same wherein this WCJ noted that the quick demonstration from Applicant's peers did not constitute '*sufficient training*'. Defendant further contends that it was not aware that Applicant did not have a helmet or know how to operate an ATV purportedly again relying on the fact that Hines was not sure of the name of the supervisor.

To be clear and put to rest any ambiguity in the F&A, this is not an issue of insufficient training and Defendant appears to be placing form over substance. The undersigned does not find the issue to be adequacy of training, but rather the lack of training provided to the Applicant. Asking one's peers how to get an ATV to stop and go in a few seconds before a special mission is not training contemplated and required under the Injury and Illness Prevention Program under GISO 3203(a)(7)(C).

4. LABOR CODE SECTION 4553.1 WAS SATISFIED

Finally, Labor Code § 4553.1 eases the employee's difficulty in proving a S&W claim by establishing the Division of Occupational Safety and Health's (Cal/OSHA's) regulations (found in Title 8 California Code of Regulations, and also known as safety orders) as the standard of care for employers. An employee can use the Division's safety orders to establish S&W liability if he can show:

1. the "specific manner" in which a safety order was violated;
2. the violation caused the employee's injury; and
3. both the safety order and the conditions making the safety order applicable to the work were known by a particular named person, who can be either the employer, a partner or a managing representative (e.g., a foreman, supervisor or higher).

Here, GISO in subchapter 7 establishes minimum occupational safety & health standards that apply to all places of employment in California. Title 8, California Code of Regulations, subchapter 7, General Industry Safety Orders, sections 3203(a)(7)(C) provides: (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum . . . (7) Provide training and instruction . . . (C) To all employees given new job assignments for which training has not previously been received. General Industry Safety Orders, sections 3203(a)(7)(C).

The nature of the safety order is broad as drafted but was designed to cover all places of employment in California. Therefore, the undersigned focused on the nature of the training germane to this case. Clearly, not every instance of failing to provide training would result in a serious and willful finding. However, as the peril to the employee intensifies, the more consideration is given to the safety order. Applicant has established the *prima facia* elements of violation of 3203(a)(7)(C) were satisfied. Here, the Applicant filed a separate Petition for Serious and Willful outlining the specific manner in which the safety order was violated. Applicant testified that while he was driving, he lost control and was suddenly thrown off the ATV landing on his head. Had the Applicant been provided with training for this new job assignment, it is reasonably foreseeable that the accident could have been prevented. Therefore, the undersigned finds that failure to train did proximately cause the injury. Finally, the employer knew or should have known that driving the ATV without training was likely to result in defective operation of the ATV. The employer's failure to take any corrective action equates to a reckless disregard for the probable consequences.

Finally, the undersigned finds that policy reasons also support upholding this decision. The employer at hand, as a matter of course, likely engages in various sorts of special assignments and should not be allowed to punt accountability for the failure to take into consideration the safety of its employees because the group leader for the mission was not part of the

employee's regular assignment or held a title not considered in a supervisory role.

IV. RECOMMENDATION

The question of whether serious and willful misconduct of the employer caused the employee's injuries is essentially one of fact. If there is any substantial evidence to support the appeals board's findings, it will not generally be disturbed. *Vega Aircraft v. IAC* 11 Cal. Comp. Cases 9, 11. For the reasons stated above, it is respectfully requested that the decision not be disturbed and Defendant's Petition for Reconsideration be denied.

DATE: 4/11/2022
Josephine Broussard
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE