WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE ARGUETA GUZMAN, ***Applicant***

vs.

GREEN FARMS, INC.; GREAT AMERICAN INSURANCE,
Defendants

Adjudication Number: ADJ13762384
Van Nuys 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 determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). (*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 determination(s). (*Id*.)

The WCJ provides in the Opinion on Decision that the medical-legal report and deposition testimony of the Panel Qualified Medical Examiner (PQME) Dr. Gillis was based on an inaccurate version of the events surrounding the injury. (Opinion on Decision, p. 4.) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Accordingly, we agree that the March 3, 2022 PQME report authored by Dr. Gillis is not substantial evidence.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ _CRAIG SNELLINGS, COMMISSIONER__________

I CONCUR,

/s/ _JOSÉ H. RAZO, COMMISSIONER_____________

/s/ _ANNE SCHMITZ, DEPUTY COMMISSIONER___

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 23, 2022

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

BENJUMEA & ASSOCIATES
JOSE ARGUETA GUZMAN
ROSE, KLEIN & MARIAS

LN/oo

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

The undersigned issued his Opinion on Decision and Findings of Fact & Order Taking Off Calendar on 6/6/2022. Defendant, Great American Insurance, has filed a timely, verified, Petition for Reconsideration on 6/24/2022.
Defendant contends that:

1. The Appeals Board acted without or in excess of its power,
2. The evidence does not justify the Findings of Fact,
3. The Findings of Fact do not support the Order, Decision or Award.

The primary issue at trial herein, was whether applicant's injury at work was barred by the intoxication affirmative defense pursuant to L.C. §3600(a)(4). The undersigned found that defendant had failed to meet its burden of proof relating to the affirmative defense and that applicant's injury was compensable. It is from this finding of fact that defendant has petitioned for reconsideration.
The undersigned disagrees with defendant's analysis and would recommend that reconsideration be denied.

II
FACTS

Jose Argueta Guzman, born [], began his employment with Green Farms, Inc. in approximately 2018. He was hired to work in the sanitation department but was the primary person within that department responsible for handyman/maintenance work activities. The employer was a wholesaler of food products, utilizing a large warehouse where applicant was assigned to work.
According to applicant's trial testimony, which was substantially corroborated by his immediate supervisor, Genghis Patel (Applicant Exhibit 1), applicant's job duties were somewhat varied, including cleaning, stocking, as well as repair and maintenance on the company's three types of mechanized movers/lifts, which were identified as forklifts, scissor lifts, and riders. Applicant's repair duties involved changing tires, batteries, and performing other relatively uncomplicated maintenance on the three vehicles. More extensive repairs were contracted to outside providers. From the testimony presented, applicant's job assignments usually came directly from his supervisor, or in the alternative, applicant knew what needed to be done and did it.

From the testimony, it was apparent that just prior to the date of injury on 9/16/20, a repair issue was noted related to a scissor lift. Either two or four bolts were missing from the lift which held the axle/wheels in place and allowed for proper steering of the lift. There was a discrepancy between the applicant and his supervisor over who requested, or suggested, that the bolts be replaced, but

the difference was not material, as even the supervisor admitted that he purchased the bolts for the applicant, and provided them to him, knowing that they would be used in maintaining the scissor lift.

On 9/16/20, applicant arrived at work at 6 a.m. and started work. He testified without impeachment that he completed one repair task and then proceeded to work on the scissor lift. Just before 9 a.m., applicant had positioned a front fork from the forklift under the side of the scissor lift in order to lift it up to align the bolt holes for placement of the bolts. Employer work place video, which visualizes the events that followed, was viewed at trial (Applicant Exhibit 1).

It is clear that applicant walked up to and stepped onto the operating platform of the forklift, where he operated its mechanized motor to slightly lift the fork under the scissor lift to in turn slightly lift the scissor lift up at the end where the forklift fork was placed. Applicant then exited the forklift, checked the alignment of the bolts holes on the scissor lift, and while doing so, lightly rested his head either on, just above, the forklift fork. Suddenly the scissor lift shifted slightly and the fork under the lift "popped out" and moved upward, striking the applicant quickly and forcefully on the side of the head. Applicant immediately dropped to the ground, appearing unconscious.

Applicant was found on the ground by a coworker who summoned help. It is apparent from the accident reports, as well as the hospital records, that initially no one knew how applicant sustained his head injury, with some suspecting that he had fallen from the scissor lift.

Applicant was transported to a hospital where he remained for a number of days. He was diagnosed with a right eye injury (rupture of the right globe and reported blindness), right orbital fracture, other facial fractures, and a 3" laceration under his right eye. A CT scan of his brain was interpreted to evidence a parechymal hemorrhage that was <u>consistent with a diffuse traumatic axonal injury (emphasis added)</u>.

Blood and urine testing at the hospital, was interpreted to evidence recent use of [drugs]. Applicant acknowledged use either one or two nights prior to date of injury, with recurrent use approximately three times per week for three months prior to the accident.

Medical reviewers concluded that it was most probable that applicant had last used the drug late in the evening prior to his accident. Applicant denied ever using the drug at work, and there is no credible evidence that he did so on the date of his injury.

Defendant denied applicant's specific injury claim herein based on L.C. §3600(a)(10)(4), contending that applicant's injury was caused by intoxication.

III
DISCUSSION

DID THE UNDERSIGNED COMMIT ERR IN FINDING THAT DEFENDANT FAILED TO MEET ITS BURDEN OF PROOF THAT APPLICANT'S WORK PLACE INJURY WAS BARRED BY THE INTOXICATION AFFIRMATIVE DEFENSE?

No. It is clear from the evidence presented that applicant was performing his usual and customary work duties on the employer's premises at the time he sustained injury on 9/16/20.

An employer injury investigation notes that applicant was performing tasks he was assigned to do at the time of his injury (Applicant Exhibit 5).
Defendants contend that applicant's otherwise compensable injury, is barred by the intoxication defense pursuant to L.C. §3600(a)(10)(4). Defendant has the burden of proof, pursuant to L.C. §3202.5 in proving by a preponderance of the evidence that the affirmative defense is applicable herein. The intoxication defense requires defendant to prove three things:
(1) applicant ingested alcohol or unlawfully used a controlled substance, (2) use of that substance cause intoxication, and (3) the intoxication caused applicant's injury.

In this case it is clear that applicant used non-prescribed [drugs] late in the evening prior to the start of his workday on 9/16/20. Applicant acknowledged a last use time line at trial that is compatible with expert opinion on his most probable last usage of the controlled substance.

It is also clear from blood and urine analysis from samples obtained a few hours post- injury, that applicant's predicted drug levels at the time of injury were compatible with some level of impairment. PQME, Dr. Gillis, noted that being under the influence of [drugs] can cause symptoms associated with euphoria, impaired judgement, aggressive behavior, restlessness, and hyperactivity. There was no evidence presented at trial, however, to support that applicant demonstrated any of those possible symptoms at any time on the day he was injured. A review of the video tape of the two minutes surrounding applicant's injury does not identify any physical mannerisms or movements supportive of euphoria, aggression, restlessness or hyperactivity. There was no testimony from anyone at work that applicant demonstrated any of those symptoms on the day of his injury, or for that matter, at any previous time during his employment (despite admitted recurrent drug use while off work). His immediate supervisor testified that he never saw applicant visibly intoxicated or impaired, but that if he had, he would have sent applicant to the main office, as he had with two other employees in the past.

Defendants, however, failed to prove that any impairment/intoxication caused

applicant's injury. Applicant testified credibly and without impeachment that he had used forklifts to lift other heavy things regularly during his employment. He used them to lift other forklifts to replace tires. Defendant contends in its petition that applicant's intoxication may have caused him to perform the scissor lift repair in an unsafe manner. However, specific to the industrial accident herein, there was no testimony from anyone that applicant used the forklift in a different manner than he had ever done in the past to lift something heavy, in order to establish that his drug use caused impaired judgment relating to how he used the forklift in this case. There was no testimony that he previously always <u>secured</u> the forklift forks in some fashion to the heavy object he was lifting, or that he previously always used <u>both</u> forks to lift a heavy object rather than a single fork, or that he always previously <u>immobilized</u> the object to be lifted so it would not move during the lifting process. There was no evidence presented that applicant performed the scissor lift lifting on the date of his injury in any different manner than he always lifted heavy things in the past when he wasn't impaired.

Applicant was provided with no training on how to properly use a forklift for such tasks, assuming that a forklift use for that purpose is even allowed. OSHA cited and proposed multiple fines against the employer relating to applicant's injury in part for allowing someone not qualified to make repairs on a scissor lift, and in part for allowing applicant who was not competent or trained to perform the repair activity, and in part for not having the load to be lifted secured (Applicant Exhibit 2).

More perplexing is PQME, Dr. Gillis', conclusion that applicant somehow sustained a stroke while under the scissor lift caused by his [drug] use and hypertension, then passed out and hit his face on the forklift fork as he fell, causing the multiple facial fractures and cuts. This "analysis" is not factually based, and is quite frankly the strangest interpretation of events that the undersigned has ever seen. Even defendant in its petition for reconsideration notes at page two that "applicant appears to have been struck by the front fork", and at page four inexplicably argues that, "There is no substantial medical evidence to support that applicant was hit by the forklift", while in the very next paragraph states, "The video does depict the applicant was struck by the front fork of the forklift".

Defendant argues in its petition that the video tape of the two minutes surrounding applicant's injury is not clear. The undersigned disagrees and would strongly recommend review by the Board. The undersigned's trial summary of the video is precise. A review of the video tape of the accident, does not require a medical opinion on the sequence of events leading up to applicant's injury. Applicant was clearly hit forcefully in the face by the forklift fork. He had no noticeable limitations in his actions/movements prior to that event, and he dropped immediately to the ground, apparently unconscious, immediately following that event. There is also no evidence that applicant had his head underneath the scissor lift prior to his injury.

As Dr. Gillis' opinion relating to whether applicant's intoxication/impairment caused his work injury is based on a clearly unsupported version of how the injury occurred, and due to the fact that based on the facts presented in this case any conclusion that applicant's intoxication/impairment caused the injury to occur is speculative, the undersigned found that defendant had failed to meet its burden of proof that applicant's injury was barred due to intoxication pursuant to L.C. §3600(a)(10)(4).

Based on that finding, it was further found that applicant sustained injury on 9/16/20, while employed by Green Farms, Inc., as a maintenance worker, occupational group number deferred, at Los Angeles, California, to his face, head, and right eye, and that the record required further development relating to compensability associated with applicant's claim of injury to his neck, neuro, in the form of traumatic brain injury (TBI), and psyche/stress. The undersigned does not believe that he committed err in making those findings.

IV
RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied.

DATED: 06/28/2022

S. MICHAEL COLE
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE