

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

ANDREW BURNETT, *Applicant*

vs.

**HIGH DESERT JUVENILE DETENTION AND ASSESSMENT CENTER;
PERMISSIBLY SELF-INSURED; ADMINISTERED BY
COUNTY OF SAN BERNARDINO, *Defendants***

**Adjudication Number: ADJ11250045
San Bernardino 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/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

I DISSENT (See Dissenting Opinion),

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 27, 2023

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

**ANDREW BURNETT
MOORE AND ASSOCIATES
MICHAEL SULLIVAN & ASSOCIATES LLP**

AS/mc

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

DISSENTING OPINION OF DEPUTY COMMISSIONER ANNE SCHMITZ

I write specifically to take issue with the WCJ's interpretation of *Smith v. Calistoga Elementary School*, 2023 Cal. Wrk. Comp. P.D. Lexis 202 (ADJ10945733), *a case where I was a panel member*.

In her Report, the WCJ states that:

In *Smith v. Calistoga Elementary School*, (2023) Cal. Wrk. Comp. P.D. Lexis 202, the WCAB held that a teacher who had suffered a fracture to her elbow after she was unexpectedly knocked down by a student did not suffer a violent act for the purposes of LC 4660.1(c)(2)(a). The WCAB noted that although most injury-causing accidents are surprising, not all injury-causing accidents are the result of violent acts as contemplated by LC 4660.1(c)(2)(a).

However, according to the evidentiary record in *Smith*, applicant testified over two days of trial, and defendant offered Bailey Tucker, a teacher at the elementary school in rebuttal as follows:

Debra Smith was injured on September 23, 2015. At the end of the school day, she was coming out of a teachers' bathroom and was knocked down by a student. The student hit her from the right. She was not expecting it. She ended up landing on the ground three feet away. Her body impacted the concrete, and the student landed on her. The student was in second or third grade. At the time, she weighed 130 pounds. Her feet left the ground. She hit the concrete and fractured her elbow. The first to hit the ground were her knees. (Minutes of Hearing, Summary of Evidence (MOH) December 14, 2020, pp. 5-6.)

She testified that the children that knocked her down were coming from the classrooms and not from the playground, and that made the collision unexpected. There were two children running. One was being chased, and witnesses said that one of the children was pushed. . . She was hit near the ankles. Her feet left the ground, and she traveled about three feet. (MOH, March 1, 2021, pp. 3-4.)

Defendant's witness Bailey Tucker testified as follows:

He assumed that her injury took place at one of the staff bathrooms, which is close to the playgrounds but did not know where the accident occurred. It would not be unusual for students to be running in that area, but they're not supposed to. He estimated the size of an average second grader at three to three-and-a-half feet tall and 50 to 60 pounds. He agreed that at that age they are learning to control their body as that is developing. He stated that second graders are generally very active and that it would not be unusual for a second grader to bump into a PE teacher. Part of his job as a PE teacher is to help students learn how to control their movements. (MOH, March 1, 2021, p. 3.)

He did not observe the collision between a student and Ms. Smith. He agreed that at that age, students are not always mindful of their body and are not always in control. He would not be surprised if students were running in the area where he assumed the accident took place, and that they would not be paying attention to where they were going. It was conceivable that students would collide with the teacher in that area. He stated that if a 60-pound kid collided with him, he would not be knocked down. It is conceivable that a teacher could be knocked down, but it would be relative to the individual teacher. (MOH, March 1, 2021, p. 3.)

In contrast, in this case, defendant offered no witness testimony to rebut applicant's testimony, and applicant testified as follows:

. . . [W]itness stated that he did train as a peace officer for four months for correctional officer training and peace officer status. At the end of this training, he was sworn at a ceremony as a peace officer and he was moved to a facility as a correctional officer. (MOH, June 28, 2023, p. 4.)

As a probation correctional officer, he was assigned to work initially for the first couple of days at the Juvenile Detention and Assessment Center in San Bernardino. He then was assigned to the High Desert Juvenile Detention and Assessment Center. (MOH, June 28, 2023, p. 5.)

He worked at the High Desert Juvenile Detention and Assessment Center. His job duties were to assess, to watch the youth, assess his case loads and there were so many things he did. He put down any issues between youths or any issues happening in the facility, be prepared to be hands on or to use pepper spray if necessary. (MOH, June 28, 2023, p. 5.)

They managed the youth through restraints and control holds, managing them in and out of cells, managing them if they were combative. They were the ones who went in and out, and that was their job. (MOH, June 28, 2023, p. 5.)

His unit was the maximum unit, so his unit had guys who were on trial for murder, sex offenses, all the max offenses you can think of. The ages of the juveniles were from age 14, the youngest he saw, to as old as 19, if they were a juvenile at the time of the offense.

He injured his left wrist and his hand. . . . He sustained this injury when responding to a code red on his unit. A youth had a bad day in court after finding out he would get two years at Youth Authority. Then it was the end of the day and time for him to go into his room, everyone else went into their rooms, except this youth and so witness went to speak with this youth, and finally had him so that he would voluntarily go to his room, but another officer came in and said something to the youth that made him angry and at that point, the youth refused to go into his room. They tried to talk him into the room, but he refused, and the moment he refused, their supervisor told them to put him in and go hands on, they called the code red and they went hands on. He was upset and was angry and it was a fight at that point. Witness was uncramping his hands to take him in another area, so he wouldn't cause commotion in the maximum area, but he had to have cuffs on. Two other officers were holding the youth up while the youth was laying stomach down on his hand and then swinging his elbows back and forth holding his hands close to his body. Witness was trying to unlock his fingers, which were locked, and as witness was trying to get his hands apart, one of the officers dropped the youth on witness' left hand.

A code red is an incident that involves a violent act, a fight, or some type of throwing incident. It is a violent act that needs the attention of the other officers. There were about 35 officers who responded to this code red, which went on for about an hour-and-a-half. Witness cannot say the height the drop of the youth was when the youth landed on witness' hand. When he was dropped on witness' hand, witness' hand was in between the youth's body and the floor, because he was uncramping the youth's right fingers from being tied into the left. If he could get the right hand away from the left hand, they would be able to restrain him, put handcuffs on him and remove him from this unit to an empty unit at the time.

This encounter with this juvenile, the juvenile was fighting back, being physical, pushing and being combative. Witness knew he sustained an injury that evening, because his wrist was hurting. . . . The next day, he told the watch commander about it and he was told to put his name on the list of things that happened on the previous day during the code. (MOH, June 28, 2023, pp. 5-6.)

Witness confirmed that he worked with youths who were combative. He confirmed these youths had committed maximum offenses. Combative means physical fights and altercations, argumentative, and anything to do with combative. The physical fights didn't occur in his unit every day, but there was every day some type of physical event in the facility. Witness is 5' 9".

When he last worked at the Juvenile Assessment Center, he weighed 200 pounds. He now weighs 220 pounds, if he is not mistaken. (MOH, June 28, 2023, p. 11.)

The youth was fighting back. The youth was resisting when they were trying to get him into his unit. He was uncrimping interlocked fingers. The right hand fingers were interlocked with the left hand fingers, and the hands were held close to the youth's chest area. He called the code red because he was refusing to go up into his room and the supervisor requested them to go hands on, which meant no pepper spray. That meant forcefully taking the youth into the unit. Witness was involved in forcefully trying to take the youth. He took a stance as if to throw a punch. He got into a fighting stance.

Later on, as the code went on, the youth laid on his hands with his fingers locked and every time they would try to uncramp the youth's fingers, he would move around and fight back. Witness was hit in the shoulders with the youth's elbows when he swung back and forth resisting.

There were approximately 35 officers who responded, but he doesn't know for sure. When the youth started moving his body around, it was just witness, his partner and the supervisor went in hands on. The moment they went hands on, they grabbed him and tried to gain control through control holds, techniques they use to gain control, but they were not successful. This youth was 16 years old. It was just witness and his co-worker who tried to use control holds.

Another officer told the youth something that upset him. Witness heard what the officer told the youth, but he doesn't recall it exactly, but it had to do with the youth's court case that day, but it made the youth upset. The rest of the officers showed up in the midst of the combat. Witness didn't see what was going on at the time because he was in the midst of the combat. They would rotate back in to get the youth to calm down and comply. Witness never punched this youth. Witness doesn't recall if any other officer punched this youth. Witness was trying to restrain the youth and get him in his room. The co-workers dropped the youth on witness' wrist. (MOH, June 28, 2023, pp. 11-12.)

Even without an opportunity to observe the witnesses as they testified, the summaries of testimony reveal the following. In *Smith*, a 130 pound teacher was knocked down by a second grader. The child was never identified, so no details exist as to what the weight of the child was. Defendant's witness speculated that a child of that age would be about three and a half feet tall and weigh about 50 to 60 pounds, and applicant submitted no evidence to dispute that assertion. According to applicant, "witnesses" said a child was chasing another child, and one child was pushed, however, applicant presented *no testimony as to how the incident actually occurred*. In contrast, here, applicant was not injured by frolicking second graders. Applicant was injured by an angry and combative sixteen year old, who was being held in a maximum security area of the facility for those accused of murder, sex offenses, etc. Applicant was equipped with pepper spray

and trained to use control holds. Applicant weighed about 200 pounds at the time of the injury. The injury occurred during a Code Red, which lasted for about an hour and a half, where about 35 officers responded. As applicant and two other officers were attempting to restrain the youth, the two other officers dropped the youth on applicant's left hand, and as they struggled, applicant's hand was trapped under the youth's body on the cement floor.

An employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.) Labor Code section 4660.1 governs how to determine permanent disability for injuries occurring on or after January 1, 2013. (Lab. Code, § 4660.1.) Section 4660.1 bars an increase in the employee's permanent impairment rating for a psychiatric disorder arising out of a compensable physical injury occurring on or after January 1, 2013 unless the injury falls under one of the statutory exceptions. As pertinent herein, section 4660.1(c) provides in relevant part as follows:

(c) (2) An increased impairment rating for psychiatric disorder shall not be subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:

(A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3.
(Lab. Code, § 4660.1(c)(2).)

In *Larsen v. Securitas Security Services* (2016) 81 Cal.Comp.Cases 770 [2016 Cal. Wrk. Comp. P.D. LEXIS 237], a security guard was struck by a car from behind while on a walking patrol causing her to fall, hit her head and lose consciousness. The applicant reported hitting her head so hard when she was hit by the car that she thought she was going to die. She was taken by ambulance to the emergency room. The panel in *Larsen* defined a "violent act" for purposes of section 4660.1 as an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening. (*Id.* at pp. 774-775.)

Applying this definition, the panel concluded that "[b]eing hit by a car under these circumstances constitutes a violent act" and thus, applicant was entitled to additional permanent disability for her psyche injury as an exception to section 4660.1(c). (*Larsen, supra*, 81 Cal.Comp.Cases at p. 775; see also *Madson v. Michael J. Cavaletto Ranches* (February 22, 2017, ADJ9914916) [2017 Cal. Wrk. Comp. P.D. LEXIS 95] [a truck driver pinned and crushed in his

vehicle for approximately 35-40 minutes with a fractured neck while fearing that the truck would catch fire before he was extricated qualified as a violent act outlined in *Larsen*].)

Subsequent decisions since *Larsen* and *Madson* have followed the definition of a “violent act” for purposes of section 4660.1 as an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening. (See *Lopez v. General Wax Co., Inc.* (June 19, 2017, ADJ9365173) [2017 Cal. Wrk. Comp. P.D. LEXIS 291] [candle maker’s partial finger amputation in a machine was a violent act]; *Allen v. Carmax* (July 10, 2017, ADJ9487575) [2017 Cal. Wrk. Comp. P.D. LEXIS 303] [accident after car brakes failed when the applicant attempted to avoid hitting a pedestrian resulting in collision with a cement pillar was a violent act]; *Greenbrae Mgmt. v. Workers’ Comp. Appeals Bd. (Torres)* (2017) 82 Cal.Comp.Cases 1494 (writ den.)] [landscaper’s fall from a tree hitting his head multiple times and losing consciousness was a violent act].)

In *Smith*, applicant simply did not meet her burden to show that her injury was caused by either a strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening. That is, there was no evidence presented about how the incident actually occurred or how fast the child was running so as to prove that the second grader was a strong, extreme or intense physical force. Moreover, based on the evidence presented, it appears that the children were acting as would be expected by second graders, and there is nothing inherent in the circumstances to indicate that the act was vehemently or passionately threatening.

In contrast, here, the youth was struggling and angry and sixteen years of age, rather than seven years of age and 50 to 60 pounds, and the youth made contact with applicant’s left hand, not applicant’s body while standing. That is, when considering the “force,” the object causing the collision and the object that is subject to the collision must be taken into account, and here the evidence suggests a strong, extreme or intense physical force. More significantly, the circumstances here were clearly ***vehemently or passionately threatening***. That is, the injury occurred during a Code Red emergency, lasting an hour and a half and requiring 35 officers to respond, and where applicant and two other officers were attempting to control a combative angry youth, housed in the maximum security area of the facility.

Accordingly, I would find that applicant met his burden to show that he was a victim of a violent act.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 27, 2023

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

**ANDREW BURNETT
MOORE AND ASSOCIATES
MICHAEL SULLIVAN & ASSOCIATES LLP**

AS/mc

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

By timely, verified Petition for Reconsideration, filed 9/27/2023, Petitioner, Andrew Burnett (hereafter applicant), by and through his attorney of record, Olaleye O. Moore of Moore and Associates, seeks reconsideration of the Findings, Award and Order issued herein on 9/14/2023.

Respondent, County of San Bernardino (hereafter defendant), by and through its attorney of record Juan Naranjo of Michael Sullivan & Associates, filed a timely and verified Answer to the Petition for Reconsideration on 10/6/2023.

ISSUES PRESENTED

1.

Was it error not to award applicant psychiatric permanent disability?

INTRODUCTION

Applicant, Andrew Burnett, a Probation Correctional Officer, sustained an orthopedic injury to his left wrist and elbow on 10/26/2017. As a result of that physical injury, applicant was determined after trial to have also sustained an injury arising out of and in the course of employment to his psyche.

In the decision complained of, pertaining to the issues raised on reconsideration, the undersigned Workers' Compensation Administrative Law Judge found as follows:

The psychiatric permanent and stationary report of treating psychiatrist, E. Richard Dorsey, M.D., dated 2/27/2023, while finding that applicant sustained a psychiatric injury due 100% to occupational physical injury of the left wrist, found that applicant had sustained no ratable psychiatric impairment. Dr. Dorsey determined that he did not find any need for future medical treatment to the psyche at this time. Dr. Dorsey's 2/27/2023 report (Exhibit G), is silent as to whether or not applicant sustained any temporary total or temporary partial disability as a result of the injury to his psyche, but did indicate that applicant was mentally able to resume his former job (probation correctional officer) or to continue with his current job (delivery truck driver for a different employer), without any restrictions. The only of Dr. Dorsey's earlier reports, specifically Exhibit 2-M, dated 7/24/2020, that actually addresses applicant's disability status, indicates that Dr. Dorsey did determine applicant was temporarily

partially psychiatrically disabled, but he made no mention of whether applicant could or could not perform his work duties with the County of San Bernardino, either with or without restrictions, so Dr. Dorsey's reporting is not helpful on the issue of temporary disability.

The Panel QME in psychiatry, Allen H. Lee, M.D., in his 4/7/2022 report (Exhibit 3), found that applicant sustained an industrial psychiatric injury due to the impact of the orthopedic industrial injury. He found applicant to have reached MMI as of the date of the examination (4/7/2022), and that from a psychiatric standpoint, applicant was likely temporarily partially disabled since he stopped work in May of 2018 until 4/7/2022. Dr. Lee estimates applicant's GAF score to be a 66, a 6% whole person impairment, if applicant was entitled to psychiatric impairment. Dr. Lee apportions 85% of the psychiatric impairment to the orthopedic industrial injury and 15% to non-industrial factors. However, permanent disability to the psyche is precluded based on LC Section 4660.1(c)(1), insofar as it is predominantly caused by a physical injury. Therefore, applicant is not entitled to an increased rating by reason of injury to the psyche. Dr. Lee opines that applicant's psychiatric treatment has been reasonable and necessary, and he should be afforded psychiatric follow-up care with Dr. Dorsey.

I find that applicant did sustain a psychiatric injury and is entitled to future treatment for it, but he is not entitled to an increase in rating by reason of the fact that his psychiatric injury was predominantly caused by the orthopedic injury, and the Labor Code precludes a rating for psychiatric injury caused by the physical injury to the left wrist. I find both Dr. Dorsey's and Dr. Lee's opinions as to industrial psychiatric injury to be adequately supported and substantial in regard to causation, but I find Dr. Lee's report to be more persuasive on the need for further medical treatment. Neither report supports a rating for disability impairment by reason of the psychiatric injury, insofar as the psyche injury was predominantly caused by a physical injury, and thus a rating is precluded per LC 4660.1(c)(1).

DISCUSSION

1.

Was it error not to award applicant psychiatric permanent disability?

LC 4660.1(c) states: “(1) Except as provided in paragraph (2), the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase. This section does not limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury. (2) An increased impairment rating for psychiatric disorder is not subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following: (A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3...”

LC 3208.3(b)(1) and (2) states: “(b)(1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury. (2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.”

The applicant never asserted at trial that the incident that resulted in his left wrist injury was the cause of his psychiatric injury. It was the loss of his position as a Probation Correctional Officer due to his physical limitations and inability to continue in his career as a corrections officer that caused his psychiatric injury. It is not at all unusual for correctional officers at a juvenile detention center to encounter resistant juvenile inmates requiring applicant and other correctional officers to subdue an unruly juvenile. Correctional officers are trained to deal with unruly and resistant juvenile offenders, and it is part of their usual work duties.

Applicant testified that physical fights didn't occur in his unit every day, but there was every day some type of physical event in the facility where he worked. It was in one such encounter with a resistant youth when applicant was trying to restrain the youth and get him in his room that one of applicant's colleagues dropped the juvenile on applicant's wrist. I would not interpret the encounter resulting in applicant's wrist injury as applicant being a victim of a violent act.

As pointed out by defendant in their Answer, the WCAB, in the en banc decision in *Wilson v. State of CA Cal Fire*, (2019) 84 CCC 393, explained that a violent act focuses on the mechanism of the injury rather than the injury itself, indicating that a violent act would be characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening.

In *Smith v. Calistoga Elementary School*, (2023) Cal. Wrk. Comp. P.D. Lexis 202, the WCAB held that a teacher who had suffered a fracture to her elbow after she was unexpectedly knocked down by a student did not suffer a violent act for the purposes of LC 4660.1(c)(2)(a). The WCAB noted that although most injury-causing accidents are surprising, not all injury-causing accidents are the result of violent acts as contemplated by LC 4660.1(c)(2)(a).

The mechanism of applicant's psychiatric injury was not the physical act of his colleague dropping the juvenile on applicant's wrist, which certainly cannot be construed as a violent act within the meaning of the labor code section. The psychiatric injury was caused by applicant's loss of his career as a probation correction officer due to the impairments from the orthopedic injury he sustained. Applicant's testimony was that when he realized he couldn't go back to work as a probation correctional officer, it devastated him. It was not the work incident that caused the psychiatric injury, but it was his inability to return to work as a correctional officer.

It was not error to determine that applicant's psychiatric injury warranted no increase in permanent disability insofar as it arose from a compensable physical injury and the exceptions do not apply insofar as the psychiatric injury was not caused by a violent act within the meaning of the statute.

RECOMMENDATION

I recommend the Petition for Reconsideration, filed by applicant on 9/27/2023 be **DENIED** on the merits.

Dated at San Bernardino, California

October 10, 2023

MYRLE R. PETTY
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE