

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

ALASON L. BRAGG, *Applicant*

vs.

GOODWILL INDUSTRIES OF SOUTHERN CALIFORNIA; ADMINSURE, *Defendants*

**Adjudication Number: ADJ16695855
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.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 12, 2024

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

**ALASON L. BRAGG
LAW FIRM OF ROWEN, GURVEY & WIN
DONALD J. GABRIEL, ESQ.**

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

I
INTRODUCTION

10/26/2023

Identity of Petitioner Defendant

Verification Yes

Timeliness Petition is timely

Petition for Reconsideration Filed 11/13/2023

Petitioner's Contentions:

- a. By the order, decision or award made and filed by the Workers' Compensation Administrative Law Judge, the WCJ acted without or in excess of its powers;
- b. The evidence does not justify the findings of fact;
- c. The findings of fact do not support the order, decision or award; and
- d. The order, decision, or action will result in significant prejudice.

This matter came on for trial before the undersigned on multiple days, most recently on August 22, 2023. Applicant testified on her own behalf. Defendant offered the testimony of regional loss prevention manager, Jose Suarez. Following the completion of Ms. Bragg's examination, the parties were given an opportunity to file optional post-trial briefs, and the matter was submitted for decision on September 5, 2023. The Court carefully reviewed and considered the post-trial briefing. Findings and Award issued and were served by mail on October 26, 2023.

Defendant filed a timely verified petition for reconsideration of the Findings and Award. Petitioner contends the WCJ erred by finding that applicant sustained injury AOE/COE. Defendant makes extensive citation to the summary of the surveillance video. Defendant additionally argues that the Court erred by finding that applicant was entitled to medical treatment consistent with the finding of injury AOE/COE. Finally, Defendant argues that the decision to impose costs and sanctions against it violated its right to due process, and that it withheld \$5710 fees based upon its good faith belief that applicant had committed fraud.

II FACTS

Ms. Bragg testified that on July 22, 2022, she was performing her duties tagging and pricing clothing.¹ At the moment of the incident, she was tagging garments, approximately 6 to 8 inches away from the clothing rack. She was looking down, as she had to be careful with the pricing gun to avoid the needle going into her hand. Suddenly, the clothing rack was pushed onto her and was on top of her. She "went into the mutt, [which is a wire cage that holds clothing], and then I don't know, I just started holding my head because I was really surprised at all this." She loudly² announced,

"Were you trying to kill me?" She told those present that she had rods in her back and that she was going to go to the hospital.³ She then left for Kaiser.

The clothing rack contacted her body, striking her chest around the top of her rib cage. This caused her to go backwards, and her neck, upper back and left shoulder contacted the mutt behind her.⁴ Ms. Bragg's testimony as to these points was credible, and un rebutted.

Defendant has denied applicant's claim of injury and has suggested that the claim is fraudulent. In support of its position, defendant relies on security footage⁵ of applicant's work area, which defendant alleges contradicts applicant's narrative of events. Defendant presented this footage at trial, along with testimony from Jose Suarez, the Southern California Goodwill regional loss prevention manager. The Court has reviewed the entirety of the footage as proffered into evidence, consisting of two separate AVI files. Defendant did not play the second file⁶ during the trial and instead made an offer of proof that "the video shows the applicant returning to work for approximately 10 to 15 minutes after the incident on the video takes place."⁷ Following submission, the Court reviewed this second file and detailed the summary thereof in its Opinion on Decision.

¹ 5/12/23 SOE/MOH, 6:23-24.

² 7/18/23 SOE/MOH, 4:3-4.

³ 5/12/23 SOE/MOH, 7:5-17.

⁴ 7/18/23 SOE/MOH, 3:14-16.

⁵ Joint Exhibit XI

⁶ (Westchester Store #11_07-22-22 16.00.42.avi)

⁷ 8/22/23 SOE/MOH, 6:4-5.

Ms. Bragg provided a history, mechanism of injury, and general presentation to all reporting medical evaluators that is substantially consistent with her testimony at trial, namely that she was struck by a rack and went backwards into the mutt. All medical evaluators have concluded⁸ that applicant sustained injury AOE/COE. No medical evidence exists to the contrary.

III

DISCUSSION

A.

Defendant's Proffered Video Does Not Rebut Applicant's Testimony

Defendant spends the majority of its Petition citing to the summary of its surveillance video and arguing that the video establishes that applicant was not injured as she alleged. What defendant fails to acknowledge is that defendant's own witness, Mr. Suarez, volunteered⁹ on examination by defendant's attorney that when he reviewed the video, "he saw another coworker push a rack that hit a rack". In other words, as Ms. Bragg also testified, "the girl who pushed [Ms. Bragg's] rack pushed another rack into her rack, and that was when she hit the mutt."¹⁰

Both applicant and Mr. Suarez testified that one coworker pushed a rack into another rack. Ms. Bragg testified that the coworker's rack struck the rack that she was working on, which knocked her backwards. The Court does not believe that the convergence of this testimony is a coincidence. This is a very specific mechanism of action, and the video proffered by defendant unequivocally does not show it, despite that Mr. Suarez testified that he saw it. The incident at 9:20 in video "Westchester Store #1 1_07-22-22 15.49.42" involves a woman pushing on the rack where Ms. Bragg is tagging clothing. This is not a coworker "pushing one rack into another rack." The Court can only conclude that whatever Mr. Suarez saw when he reviewed the video himself was not submitted for the Court's consideration, and therefore, the video¹¹ submitted into evidence does not actually depict the injurious incident in question.

⁸ See e.g. Exhibits 1, 2, 7, 8, 10, 13.

⁹ /18/23 SOE/MOH 7:9-10.

¹⁰ 8/22/23 SOE/MOH 5:18-19

¹¹ Exhibit "XI".

While it is true that the physicians have provided accounts that offer slight variations as to the exact events that transpired, all accounts, including applicant's own testimony, consistently describe the applicant as being struck by a clothing rack and moving backwards as a result. The evaluating physicians note¹² objective physical findings on examination. Moreover, applicant's behavior in the immediate aftermath of the incident corroborates her testimony that the incident was injurious. Applicant immediately reported¹³ her injury and sought medical¹⁴ attention within 2 hours of the alleged incident. Especially in light of the fact that the incident occurred suddenly, while applicant's head was down, the Court does not find these variations to constitute inconsistencies that call applicant's credibility into question.

Ms. Bragg's explanation¹⁵ as to why the video does not show her falling backwards and striking the mutt is that defendant's video does not actually show the injurious event. Given the totality of circumstances, the Court agreed and found injury AOE/COE. Defendant does not raise any arguments on reconsideration which call these conclusions into question. Defendant does not address Mr. Suarez's confirmation that he saw something on the video that he reviewed that was not depicted on the videos admitted into evidence.

B.

A Finding of Injury AOE/COE includes Entitlement to Medical Treatment

Defendant next argues that the Court denied it due process. by awarding medical treatment consistent with its finding of injury AOE/COE. Defendant states that the issue of "medical treatment" was not raised for adjudication, and thus the Court erred by awarding medical treatment. Labor Code §4600(a) states:

- a) Medical, surgical, chiropractic, acupuncture, licensed clinical social worker, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, *that is reasonably required to cure or relieve the injured worker from the effects of the worker's injury shall be provided by the employer ... (emphasis added).*

¹² See e.g. Exhibit 1 at pgs. 12-18, Exhibit 13 at PDF pgs. 4-5; Exhibit 2 at PDF pgs. 4-5.

¹³ See e.g. Exhibits X2, 5, and 6.

¹⁴ See Exhibit 14.

¹⁵ 8/22/23 SOE/MOH 5:20-25

The undersigned's Award in subpart a) provided for "Medical treatment reasonably required to cure or relieve from the effects of the injury herein". This is mandatory. The finding of injury AOE/COE entitles applicant to medical treatment to cure or relieve from the effects of the injury as a matter of law. The form Pre-Trial Conference Statement does not even contain a checkbox for "medical treatment". The Court did not violate defendant's right to due process by awarding medical treatment in connection with its finding of injury AOE/COE.

C.

Costs and Sanctions were Properly Raised and Imposed

Finally, defendant argues that the Court erred by imposing costs and sanctions against it for its willful refusal to pay Labor Code §5710 Fees. First, defendant argues that its due process rights were violated because the WCJ did not first provide defendant with notice and an opportunity to be heard. A separate Notice of Intention was not required in this case; the issue of sanctions was specifically raised on the Pretrial Conference Statement and was heard at Trial. Defendant had every opportunity to be heard regarding this issue. Defendant did not address the issue in its posttrial brief. The Court did not violate defendant's rights to due process by adjudicating the sanctions issue that it was specifically charged to adjudicate.

The Court does acknowledge that the undersigned made mention of the fact that although defendant withheld payment in alleged reliance on Mitchell v. Golden Eagle Ins., 60 Cal. Comp. Cases 205, defendant did not comply with the appropriate procedure to defer the issue by raising an objection to the §5710 fee petition. On reconsideration, defendant notes that the issue was first raised by defendant on its 11/23/22 Declaration of Readiness. Upon review of the DOR, the Court acknowledges that although the case was ultimately set for trial on AOE/COE from the same conference, the discovery dispute was the sole issue on which the hearing was actually requested, and responsive thereto, applicant's attorney filed her objection and 2/21/2023 Petition¹⁶ for §5710 Attorney Fees and Sanctions.

¹⁶ EAMS doc ID 45160486

The Court acknowledges that given this sequence of events, which the Court did not appreciate at the time of decision, it would not have been possible for defendant to raise an objection to a Petition that had not been filed. Thus, to the extent that the Court's reasoning behind its imposition of costs and sanctions is based on an allegation that defendant did not follow proper procedure to invoke the fraud/deceit exception to the payment of §5710 fees, the Court retracts that portion of its opinion on decision.

However, this was not the only basis upon which the Court decided to impose costs and sanctions. The fact remains, the conduct in question concerns defendant's refusal to pay §5710 fees on the allegation that applicant committed fraud. Defendant did not introduce any evidence that applicant committed fraud or deceit. Defendant simply relies¹⁷ on the video footage¹⁸ offered at trial for the proposition that it does not clearly show a coworker pushing a rack into applicant's rack, which then strikes the applicant and knocks her backwards into a mutt. The problem with this position is that, as discussed supra, defendant did not establish that the video shows the incident in question. The Court has significant doubts that the video is complete. The Court cannot easily overlook Mr. Suarez's testimony¹⁹ that when he reviewed the video, he saw a coworker push a rack into another rack. Either Mr. Suarez was telling the truth, and the video he saw was not proffered for the Court, or his testimony was erroneous, which calls into question the balance of what he says he saw or what he did when he prepared the video for the Court's consideration. Given these discrepancies, and in light of applicant's credible testimony and corroborating behavior, it is clear that applicant's claim is not fraudulent.

Even were the Court to assume that the video offered at trial is the complete video of the allegedly injurious incident, that video depicts an incident involving a coworker pushing a clothing rack towards the applicant that may have struck her body. Further, given the totality of applicant's behavior in the immediate aftermath of the incident, as demonstrated by all of the corroborating evidence²⁰ also discussed supra, in order for defendant to take the position that applicant committed fraud, defendant would have to have the Court believe that applicant made a production out of a near-miss, falsely immediately reported²¹ that she was struck by a clothing rack, was so

¹⁷ See e.g. Defendant's posttrial brief at 4:2-4, Petition for Reconsideration at 8:3-11.

¹⁸ Joint Exhibit XI.

¹⁹ 7/18/23 SOE/MOH 7:9-10.

²⁰ See e.g. Exhibits X2, 5, 6, and 14.

²¹ See Exhibit X2.

committed to her scheme that she left work and proceeded to urgent care²² within hours that same evening, where she also falsely reported²³ that she had been pushed into the mutt, that there is some other unspoken reason why the applicant had objective findings on examination, and that applicant continued that fabrication from that point forward. Defendant would also have the Court believe that Mr. Suarez's testimony that he saw a coworker push a rack into another rack, which was distinctly not shown on the video, was an unfortunate and inadvertent error. This explanation is far more complicated than the Occam's razor: applicant told the truth.

Defendant cannot casually refuse to pay \$5710 fees for a deposition that applicant's attorney dutifully attended and defended. A dispute over injury AOE/COE is not²⁴ valid grounds to withhold the attorney fee otherwise earned. The only justification for such a drastic action is a credible allegation of fraud or deceit. Even presuming the existence of a significant dispute over the nature and extent of applicant's injury, such is in no way equivalent to fraud or deceit. Defendant cannot have taken this position in good faith.

For these reasons, the Court awarded the requested costs of \$500.00 for applicant's counsel's efforts in enforcement of payment of her \$5710 fees. The Court also imposed sanctions of \$750.00 against defendant. The Court did not sanction defense counsel, Mr. Gabriel. The Court believes these orders to be reasonable and justified by the law and facts.

IV

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that defendant's Petition for Reconsideration be DENIED.

DATE: November 21, 2023

Adam D. Graff
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE