

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

HABACUC MEDINA, *Applicant*

vs.

**SITH, LLC; TRANSGUARD INSURANCE COMPANY,
Administered by GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ15449362
Pomona 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, except as noted below, and for the reasons stated below, we will deny reconsideration.

We do not adopt or incorporate the fourth paragraph on the fourth page of the Report, which begins with the word "Applicant's" and ends with the word "dog."

The injured worker holds the burden of proving injury by a preponderance of the evidence. (Lab. Code,¹ § 3202.5.) Section 3600(a) provides that: "[l]iability for the compensation ... shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment..." (Lab. Code, § 3600(a).) However, section 3600(a)(7) bars an employee's claim for compensation where the injury arises out of an altercation in which the injured employee is the initial physical aggressor. To "arise out of an altercation," as required by section 3600(a)(7), an injury must result from an exchange between two or more persons characterized by an atmosphere of animosity and a willingness to inflict bodily harm. Section 3600(a)(7) also imposes the necessity of selecting one overt act out

¹ All further statutory references are to the Labor Code, unless otherwise noted.

of a series of hostile verbal, psychological, and physical acts as the one that, for compensation purposes, caused the quarrel and elicited the ultimate injury. (*Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 719, 726 [37 Cal.Comp.Cases 124].) The Legislature's use of the term "physical" aggressor indicates that it was primarily concerned with the increased risk of injury which arises when a quarrel moves from an exchange of hostile words and nonviolent gestures to a trading of physical blows. Thus, one is not an initial physical aggressor so long as he confines his antagonism to arguments, epithets, obscenities or insults. Instead, an "initial physical aggressor" is one who first engages in physical conduct which a reasonable man would perceive to be a real, present and apparent threat of bodily harm. (*Mathews, supra*, 6 Cal.3d at p. 719.)

For the reasons stated by the WCJ in the Report, we agree that applicant was the initial aggressor in the altercation that led to his injury. Moreover, as discussed in the Report the WCJ's credibility determinations are entitled to great weight. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)

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/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 26, 2023

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

**HABACUC MEDINA
SOLIMON RODGERS
CIPOLLA, BHATTI, HOYAL & ROACH**

PAG/ara

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

Habacuc Medina, born on [] while employed on November 16, 2021 as a Warehouse Worker, at Ontario, California, by SITH, LLC, whose workers' compensation insurance carrier was Transguard Insurance Company administered by Gallagher Bassett, claims to have sustained injury arising out of and occurring in the course of employment. The trial proceeded forward on the issue of the affirmative defense of applicant as the initial physical aggressor. All other issues were deferred.

Applicant has filed a timely Petition for Reconsideration, objecting to said decision in the following particulars:

1. Petitioner contends that the undersigned erred insofar as the evidence did not justify the Finding of Fact;
2. Petition further contends that the undersigned erred insofar as the Findings of Facts did not support the Order.

FACTS ON DISPUTED ISSUES/ANALYSIS

The matter came to trial on, specifically, defendant's affirmative defense that applicant was the initial aggressor in an altercation leading to his injuries. It is defendant's burden to prove that the applicant was the initial aggressor. *Los Angeles County Metropolitan Transit Authority v. WCAB (Hicks)* 2006 71 CCC 641 (writ denied). This is often difficult, but not impossible. This is a competing testimony case – with **all** participants, including the applicant, having a vested interest in the outcome of the case despite applicant counsel's aspersions regarding the defense witnesses.

This case is about credibility. The court did not find applicant credible.

There was an initial, physical altercation. The only witnesses to what happened at the outset is the applicant and the employer, Tim Herron. Applicant testified that, on November 16, 2021 around lunchtime, without any provocation, he was attacked in the warehouse by Ryan Herron. He stated that he and Tim Herron, his boss, had an earlier verbal argument. Tim then walked away to go sit down and Ryan Herron, for no reason, bull-rushed applicant, pinning him to a wall. Then Ryan Herron and a coworker, Angel, forced applicant out of the warehouse like they were bouncers. Summary of Evidence; 11/22/22, p.2 ln. 2-14.

Francisco Lopez Galvez provided a written statement wherein he states that around 12:30 or 12:45 that day he heard yelling between Tim Herron and the applicant. He does not mention hearing Ryan or the other coworker, Angel. Exhibit B. This is a disinterested witness who contradicts the applicant's testimony.

Tim Herron testified that, at around 11:30 a.m. on November 16, 2021 he was passing applicant in the corridor between the office and the warehouse and the applicant said the something to the

effect of “being done with everything.” Tim Herron replied that applicant should just go – terminating him. Mr. Herron started walking away when the applicant shoved him against the wall. He stated that applicant smelled of alcohol. SOE: 3/14/2023, p3, ln. 11-5. At this point, Ryan Herron heard the altercation and came around from the office where he’d been working. SOE: 3/14/23, p 6, ln 21-22. He saw his father and applicant in an altercation and stepped between them, using his arms to separate them. SOE: 3/14/23, p. 6, ln. 23-25. He then grabbed the applicant in a bear hug and moved the applicant out of the building through the loading dock. SOE: 3/14/23, p 7, ln. 2-6.

Shortly thereafter, there was a further altercation in the parking lot. Applicant testified that he wanted to confront Tim. The applicant stated that he saw Tim exiting through the side door and that Tim passed the applicant. SOE 11/22/22 p.7, ln. 8-10. Applicant then claimed he ran up to Tim in the parking lot and then everything “went black,” and Tim started hitting him. SOE 11/22/22 p.4 ln. 15-16. He claims he was not trying to intercept Tim. SOE 11/22/22, p.7, ln. 11, ln. 15-16, and ln. 19-20. Applicant claimed he was grabbed by someone and that’s when he broke away and went after Tim. SOE 11/22/22, p.7, ln.10. He claimed that he yelled out to Ryan that Tim had hit him, and then Tim got in his Jeep and left. SOE 11/22/22, p. 4, ln. 17-19.

Tim Herron testified that, after the initial altercation, he went to lunch, using the side door to avoid applicant who had been escorted out the front of the building. SOE 3/14/2023, p.3, ln. 10-12. He was approximately half-way to his vehicle when applicant came running toward him and then Francisco got in between them. SOE. 3/14/23, p.3, ln. 13-14. The applicant got away from Francisco and continued running at Tim while yelling threats. SOE 3/14/23, p.3, ln. 15-17. Tim retreated between his vehicle and a delivery van when applicant reached him and they scuffled until two other people intervened and pulled applicant off Tim. SOE 3/14/23, p.3, ln. 15-18. Tim then got in his vehicle and left. SOE 3/14/23, p.3, ln. 18-19.

There is surveillance video of that second altercation.

The court observed the video. Exhibit 2. Tim Herron exits the building at the side and walks toward his car. From off to the side of the building Applicant charged Tim and was stopped by an intervening person. Applicant then breaks away and continues after Tim, chasing him around the Jeep and out of frame. Then there is further altercation with multiple persons intervening and pulling applicant off of Tim. Tim Herron gets in his Jeep and begins to drive away. Applicant again breaks free of those restraining him and chases after the vehicle. SOE: 3/14/2023, p.9, ln. 4-10.

Tim Herron’s testimony more accurately lines up with the video evidence. The applicant’s version of those events is not even close to what the video watched by the court shows.

This video and the inconstancy of applicant’s claims about the events the video showed, as well as the statement of Galvan, undermines applicant’s story regarding what happened in the initial altercation.

While the video does not show us the initial confrontation, what it does show is the applicant who is out of control and willing to physically attack Tim, who much larger than himself without

provocation. The initial “fight” was over. Applicant had been escorted from the building. When Tim, who is physically bigger than the applicant, exited through a side door to avoid the applicant, the applicant chases after him, attacks him and has to be restrained by bystanders.

The court saw a video of an applicant who was obviously not cowed by Tim’s size. The court witnessed a video wherein applicant assaulted Tim a second time. The court witnessed a video where applicant chased the Tim as he retreated; a video showing that the applicant had to be pulled away by bystanders, and a video that showed that when the Tim got in his vehicle and attempted to flee, applicant broke away again and chased after the vehicle.

Taking applicant’s unreliable statements about the second altercation, and looking back at applicant’s description of what happened in the initial altercation, the court determined that applicant’s testimony could not be considered credible and that the testimony of the employer witnesses was far more credible. Thus the court determined that applicant physically assaulted his boss, Tim Herron, in the initial altercation. Ryan Herron heard the altercation and came to the aid of Tim, his father. Ryan admitted to having to physically intervene to prevent applicant from further assaulting his father. Ryan’s size and the fact that he played little-league and middle school football is a red herring. SOE 3/14/23, p.7. ln. 19-21. The court found that Ryan didn’t start the fight, applicant did.

In short, the applicant was not credible and thus lost on the issue of initial aggressor. Determination of credibility of witnesses rests with the trial judge. Where circumstantial evidence, such as the video of the second fight, is in conflict with the direct testimony of a witness, the credibility of the witness and the weight to be given his testimony are matters within the province of the trier of fact. *Garza v. WCAB* (1970) 35 CCC 500. The judge's findings on credibility are entitled to great weight because the judge has the opportunity to observe the demeanor of the witnesses and weight their statements in connection with their manner on the stand. *Bracken v. WCAB* (1989) 214 Cal.App.3d 246, 256. The WCJ’s findings relating to credibility should only be rejected based on contradictory evidence of considerable substance. *Lamb v. WCAB* (1974) 39 CCC 310, 314, *Western Electric Co. v. WCAB (Smith)* (1979) 44 CCC 1145, 1152.

Based on same, the court found the affirmative defense of initial aggressor to be applicable and issued a take nothing award.

CONCLUSION

For all the forgoing reasons, the Petition for Reconsideration should be denied.

DATE: March 29, 2023

Amy Britt
WORKERS' COMPENSATION JUDGE