WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARIA SCIRONE, *Applicant*

vs.

CONEJO VALLEY UNIFIED SCHOOL DISTRICT; LWP CLAIMS GLENDALE, *Defendants*

Adjudication Number: ADJ11080016
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant Maria Scirone seeks reconsideration of the May 9, 2023 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant's injuries were not caused by the serious and willful misconduct of her employer.

Applicant contends that her culinary arts/food classroom violates title 5 of the California Code of Regulations, section 1005.3, Table 1004.1.2[1], which sets the maximum number of occupants at 1 student per 50 square feet for vocational room areas. Applicant further contends that her culinary arts/food classroom violates title 5 of the California Code of Regulations, section 14030(i)(2), which requires that Consumer Home Economics labs have at least 1,300 square feet. It appears undisputed that applicant's culinary arts/food classroom is 962 square feet and that she had 34 students on the date of her accident.

We received an answer from defendant LWP Claims. 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 WCJ's Report, which we adopt and incorporate, and for the reasons discussed below, we deny reconsideration.

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[1] We believe that applicant intended to refer to the California Building Code, section 1005.3, Table 1004.1.2. (Applicant Exhibit 2, Records of CVUSD, p. CVU000024.)

"It must be recognized at the outset that the statute in question does not make the employer an insurer of safety and that it does not authorize the additional award upon a showing of mere negligence, or even of gross negligence. Under the provisions of section 4553 the awards of increased benefits can be sustained only if the employes [*sic*] were 'injured by reason of the *serious and wilful misconduct*' (italics added) of the employer, and where, as here, the employer is a corporation, such misconduct must be 'on the part of an executive, managing officer, or general superintendent' of the employer corporation." (*Mercer-Fraser Co. v. Industrial Acci. Com*., (1953) 40 Cal.2d 102, 108 [18 Cal. Comp. Cases 3].)

Applicant relies on the alleged violation of the maximum number of occupants allowed in her classroom per the California Building Code and the violation of the minimum square footage required in Consumer Home Economic labs per the California Code of Regulations to support her claim that defendant is liable for serious and willful misconduct under Labor Code, section 4553.1.[2]

First, it is not clear that the cited maximum number of occupants and minimum square footage are applicable here. Applicant's classroom was built in 1977 (see Applicant Exhibit 14, p. CVU000014) and it is unclear whether the cited sections of the California Building Code and California Code of Regulations are applicable to a classroom built in 1977. Furthermore, Tim McCabe, Director of Planning and Construction at Conejo Valley Unified School District, testified at trial that the school district's architect indicated that the culinary arts/food classroom is considered a regular classroom with an occupancy allotment of 1 student per every 20 square feet, allowing 48 students in the classroom. (Minutes of Hearing/Summary of Evidence (MOH/SOE) dated March 30, 2022, pp. 5:24-6:4.)

Second, section 4553.1 specifically requires a violation of a safety order and it is not clear that applicant's citation to the California Building Code and Code of Regulations are safety orders within the meaning of section 4553.1. (See *Flores v. California Ins. Guar. Ass'n for Legion Ins. Co.* (SDO 0269028, February 14, 2008) [2008 Cal. Wrk, Comp. P.D. LEXIS 231].) ["Serious and willful misconduct may be based upon the employer's general legal duty to provide a safe place to work or upon the violation of a specific safety order. Such safety orders are found in California Code of Regulations, title 8, sections 450 through 8618."])

[2] All statutory references are to the Labor Code unless otherwise indicated.

More importantly, even if the aforementioned maximum number of occupants and minimum square footage were applicable safety orders, there is no evidence to support that "the safety order, and the conditions making the safety order applicable, were known to, and violated by, a particular named person, either the employer, or a representative designated by Section 4553, or that the condition making the safety order applicable was obvious, created a probability of serious injury, and that he failure of the employer, or a representative designated by Section 4553, to correct the condition constituted a reckless disregard for the probable consequences." (§ 4553.1(3).)

"'Wilful misconduct' means something different from and more than negligence, however gross. The term 'serious and wilful misconduct' is described . . . as being something 'much more than mere negligence, or even gross or culpable negligence' and as involving 'conduct of a *quasi* criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences' . . . The mere failure to perform a statutory duty is not, alone, wilful misconduct. It amounts only to simple negligence. To constitute 'wilful 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, supra,* 40 Cal.2d at p. 117.)

Here, the trial testimony of Jason Branham, Principal of the school applicant worked, Nicole Judd, Assistant Principal of the school applicant worked, and Mr. McCabe, indicate that they had no knowledge that they were in violation of a safety order. Mr. Branham testified that he assumed that the maximum allowance for applicant's classroom was 36-38 students per the union contract. (MOH/SOE dated March 30, 2022, p. 4:2-3.) Ms. Judd testified that she believed that contractually applicant's classroom is limited to 38 students. (MOH/SOE dated May 1, 2023, p. 2:17.) Mr. McCabe testified that he was under the belief that the maximum occupancy load for the applicant's classroom was 48 students based on the school's architect designation that the culinary arts/food classroom was a "regular" classroom. (MOH/SOE dated March 30, 2022, pp. 5:24-6:4.) Even applicant was confused as to whether her classroom was to be treated as a traditional classroom. (MOH/SOE dated February 13, 2023, p. 3:17-18.) She, however, admitted that whether her classroom is considered a regular classroom or a vocational classroom, "the allowable number of students for each of the two classroom types is 36-38 students as contractually

agreed to by defendant school district and the teacher's union." (Petition, p. 2:24-26.) Applicant had 34 students on the date of the accident. (Applicant Exhibit 4, Attendance Records.)

The many electronic correspondence between applicant and school personnel prior to her accident mainly show applicant's concern about safety surrounding special education students and the burden on her to have new students added mid-semester. (Applicant Exhibits 6-13 and 15, dated January 25-27, 2017 and February 10-28, 2017, and March 14, 2017.) They do not necessarily paint a picture of physical overcrowding, although it is evident that applicant was concerned about the number of students in her class.

We acknowledge applicant's concerns about the number of students in her class and are sympathetic to her concern about an overcrowded classroom with no place for students' personal belongings. However, the record and the evidence submitted does not support a finding that her employer engaged in serious and willful misconduct.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant Maria Scirone's Petition for Reconsideration of the May 9, 2023 Findings and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ NATALIE PALUGYAI, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 21, 2023

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

MARIA SCIRONE
GOLDSCHMID, SILVER & SPINDEL
GREENUP, HARTSTON & ROSENFELD, LLP

LSM/*pc*

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

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ11080016

MARIA SCIRONE

vs.

CONEJO VALLEY UNIFIED SCHOOL DISTRICT; LWP CLAIMS GLENDALE,

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: Dean Stringfellow

DATE: 6/1/2023

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

The Applicant is a 61 year old high school home economics teacher who sustained injuries on 4/6/2017 while employed by the Defendant. She has filed a timely and verified Petition for Reconsideration claiming that the undersigned erred by finding that Applicant failed in her burden of proof to claim that her injuries were the result of serious and willful conduct by the Defendant under Cal. Lab. Code sec. 4553 and 4553.1.

The undersigned will recommend that the petition be denied.

STATEMENT OF FACTS

The Applicant tripped and fell over a student's backpack during class resulting in the injuries herein. She had been trained in how to supervise students (7/28/2022, p.4, l.18). She instructed the students to place their personal belongings under their chairs, desks or tables (p.4. l. 20).

The Applicant taught home economics at Westlake High School that is a part of the Conejo Valley Unified School District. Applicant taught in Room 22A. Her classroom was 962 square feet with an additional 40 square feet in the form of a pantry (Ex. 5). This is a standard sized classroom applicable both to regular curricula (such as history or English) as well as arts classes which describes culinary arts (as well as shop classes, choir, ceramics, etc.) (see Tim McCabe, 3/30/2022, p.5). According to witness McCabe (head of Planning &

Construction) the construction of Room 22A was for that of a Home Economics classroom. The blueprints were approved by the State as in compliance with building codes (3/30/2022, p.6, l.10). The contract with the teachers' union calls for a maximum classroom size of 38 students (see Nicole Judd, 5/1/2023 p.2; Jason Branham, 3/20/2022, p.2). This maximum size applies to both "regular" classrooms and arts rooms such as Room 22A. The principal at the time of injury, Jason Branham, does verify that the Applicant complained about class sizes (7/28/2022, p.3, l.10). However, she did not complain specifically about potential falling hazards resulting from student materials on the floor (3/20/2022, p.4, l.19). He has no emails on that subject, and she did not specifically make such a complaint.

She indicates that email is the standard way of communicating with the principal or vice principal (2/13/2023, p.2, l.10). She indicates that she did not email the principal regarding a direct threat from student's personal belongings clogging the classroom floor nor did she email the assistant principal on that topic (2/13/2023, p.2, l.20).

The vice principal, Nicole Judd, indicates that the Applicant did complain about many things. The Applicant's primary complaint was the inclusion of special Ed students being assigned to her class due to the danger of injury from cooking. She also complained about having new students assigned in the middle of the school year who were not tested or monitored for cooking (5/1/2023, p.2, l.24 to p.3, l.5). She had other complaints, but the vice principal did not receive complaints specific to the risk of injury due to student materials on the classroom floor (p.4, l.5).

The Applicant testifies that she would stumble regularly over backpacks, purses, shoes, students and the like. She had never really fallen before 4/6/2017 (7/28/2022, p.2, l.23). She states that she told her union rep about these problems. She also maintains that she had a couple of meetings with Mr. Branham wherein she brought these problems up.

She testifies that the memos used to refresh memory were prepared by her after the date of injury (5/28/2022, p.3, l.18).

Exs. 6 – 14 are emails to and from the Applicant between January and March 2017. These emails reveal Applicant's concerns about (1) putting in new students' mid-semester, (2) lack of aid for spec ed students, (3) class size. The responses were (1) they have to put in new students as long as the size remained 38 or less, (2) there are no available aides for special Ed. Her class size on 1/25/2017 was 31 (Ex. 6). Her class size on the DOI was 34 (Ex. 4). She testifies that on 2/13/2017 she had a meeting with Mr. Branham informing him that "someone will get hurt." She indicates that she told him the same thing earlier on 1/27/2017 (7/23/2022, p.3, l.10).

The emails do not verify the subject of class safety due to student materials on the floor. Ex. 15 suggests that the meeting near 2/13 with the principal had to do with a school remodel. Ex. 7 suggests that the meetings near 1/27 (the email is 1/26) had to do with new students coming into class mid-semester. There were other complaints made by Applicant about class set up and the need for a separate lecture room.

The vice principal stated that while there were several complaints from the Applicant about class size, nothing ever cued the witness to the express dangers of the students' belongings being strewed on the floor (5/1/2023, p.4, l.5).

Exs. 3 through 13 are numerous emails with which the Applicant participated months before this accident. None of them make any reference to class safety related to student possessions on the floor or anything of similar substance.

At no point in the trial either by testimony or written evidence was reference made to Title 8, Cal. Code of Regs. secs. 450 to 8618 which constitutes the "safety orders" issued by CAL-OSHA. The only regulations mentioned in trial were under Title 5 Cal. Code of Regs. which are designated specifically as "related to school construction." The parties did not ask the court to take judicial notice of any safety orders under Title 8.

Tim McCabe testified on 3/30/2022 as the Director of Planning and Construction for the Defendant. He indicates that the Applicant's classroom was considered as a regular" classroom, and that 48 students would be considered the maximum number of students in a 962 sp. ft. room (p.6, l.1). He indicates that the school was built in 1977 and that the blueprints were approved as compliant with building codes (p.6, l.7). He notes that the regulations cited in testimony (Title 5, sec. 14010, 1004 and 1005) are codes dealing strictly with architectural design for construction. Specifically he states that sec. 1005.3 deals solely with ingress and egress as a fire regulation.

Applicant refers to Ex. 14 claiming that it sets forth regulations that require 50 sp. ft. of class space per student in vocational classes. However, Ex. 14 only notes that the County of Ventura Dept. of Building & Safety approved the architectural plans for Classroom 22A at Westlake High School and issued a Certificate of Occupancy when the building was constructed.

The undersigned concluded that the injury was not proximately caused by serious and willful misconduct.

DISCUSSION

It is pointed out that the issues raised at the time of trial only indicated a serious and willful claim under Cal. Lab. Code sec. 4553. However the evidence

presented showed that the claim clearly included sec. 4553.1 as well, and the undersigned understood this as a raised issue as well.

Cal. Lab. Code sec. 4553

Sec. 4553 states in part

"The amount of compensation otherwise recoverable shall be increased one-half, together with costs and expenses not to exceed two hundred fifty dollars($250.00), where the employee is injured by reason of the serious and willful misconduct of any of the following:

The employer, or his managing representative.
…"

In order to prevail on a petition for serious & willful misconduct it is necessary to prove that the employer had actual knowledge of a dangerous condition of employment that poses a likely threat of *serious* bodily injury. In addition, it must be known to the employer that the probable consequences of the employer's actions or non-actions will likely result in a serious bodily injury. There must also be a deliberate knowledge of the risk coupled with a deliberate failure to act. It is more than mere negligence or even gross negligence. Serious and willful misconduct has been described as quasi-criminal behavior. *Mercer-Fraser Co. v. IAC (Soden*) (1953) 40 Cal.2d 102, 18 CCC 3. It has also been held that the employer's omission must be based upon a malicious recklessness or indifference to safety. *John-Mansville Sales v. WCAB (Horenberger*) (1979) 96 Cal. App. 3d 923, 44 CCC 878.

In *Horenberger* the District Court of Appeal noted that the claim arose from an alleged failure of the employer to remove a hose on the ground. The Court noted:

"We agree such a theory (of serious and willful misconduct) would be appropriate in instances of a known defect possessing the potentiality for serious and deadly harm, such a continued leakage of explosive gas, instability in the foundation of a building, sagging high tension wires, or storage of highly inflammable material in a theater basement. Failure to correct such defects on discovery is the type of massive failure that qualifies as quasi-criminal conduct and can justify an increased award for serious and willful misconduct. But not every failure to correct known defects in the workplace amounts to serious and willful misconduct. Were such the law the distinction between negligence and willful misconduct in workers' compensation law would largely disappear."

The Court went on to note that such minor omissions as those in *Horenberger* would not obviously lead to serious bodily injury. In fact the Court even noted

that a "sporadic defect in a walking surface" could not result in a serious and willful finding. The Court concluded:

"Willful misconduct…requires an intentional act or an intentional failure to act, either with knowledge that serious injury is a probable result, or with a positive and active disregard for the consequences."

In another case entitled *Hefler v. WCAB* (2001) 66 CCC 1096, *writ denied*, the mere failure to repair carpeting failed to rise to the level of "malice, recklessness and indifference to human safety."

In a classroom setting with 34 high school kids in class, it is quite foreseeable that personal belongings could cause hazards as one ambulates round the room. However, there is no indication that this is a particularly extra hazardous environment that threatens serious bodily injury as described quite clearly in *Horenberger* above.

The Applicant is in charge of her classroom, and according to her the students are instructed to stow their belongings either under their chair or under their table. Hence this injury is also caused in part by the student in question who failed to follow the Applicant's instructions.

Furthermore, the evidence herein is very vague as to notice to the employer. The employer witnesses do confirm several complaints from the Applicant. However, before this injury occurred the thrust of the complaints dealt with student-related problems stemming from special Ed students and new students being added to the class. Class size was also a problem. However, the actual class size at the time of the injury was 34 students. This is well within the contractual limits set forth in the apparent collective bargaining agreement.

The contents of the Applicant's meeting or meetings with the principal were documented in notes prepared by Applicant only after the injury took place. The multiple emails that actually pre-date the injury do not suggest that hazards related to backpacks on her classroom floor were a significant item on their agenda. In fact, after reviewing all the testimony there is no clear picture of actual notice to the employer that a severely dangerous condition existed due to the students' personal belongings that were not properly stowed under their chairs and tables while she taught.

The Applicant taught these same students in the same room for 17 years without ever falling caused by students' personal belongings.

For these reasons the undersigned cannot find the facts to support this petition based upon the strict definitions of serious and willful misconduct set forth above.

Cal. Lab. Code sec. 4553.1

Sec. 4553.1 states:

"In order to support a holding of serious and willful misconduct by an employer based upon violation of a safety order, the appeals board must specifically find all of the following:

(1) The specific manner in which the order was violated.
(2) That the violations of the safety order did proximately cause the injury or death, and the specific manner in which the violation constituted the proximate cause.
(3) That the safety order, and the conditions making the safety order applicable, were known to, and violated by, a particular named person, either the employer, or a representative designated by Section 4553, or that the condition making the safety order applicable was obvious, created a probability of serious injury, and that the failure of the employer, or a representative designated by Section 4553, to correct the condition constituted a reckless disregard for the probable consequences."

As stated above, there was no citation to any Cal-Osha safety orders in either the pleading, the oral evidence or the exhibits in this case. Those safety orders that might give rise to relief under sec. 4553.1 are located at Title 8, Secs. 450 to 8618.

The only regulations mentioned herein are those coming under Title 5 which apply only to construction of new schools. As witness McCabe pointed out, these are strictly construction guidelines for building schools. They would provide guidelines for architects planning such construction. They are not safety orders from Cal-Osha.

Moreso, sec.s 4553.1 requires that Applicant prove the precise manner in which such a section was violated or if they were violated at all. There were 34 students in the Applicant's classroom, so it does not appear that construction regulations have anything to do with the mechanism of injury herein.

Sec. 4553.1 requires specific knowledge by the employer. In this case the only person who may have had some familiarity with these regulations was Mr. McCabe, and he maintains that they were in compliance as evidenced by the County approvals issued when the buildings were constructed.
For all these reasons, there appears to be no evidence that Cal. Lab. Code sec. 4553.1 applies in this case.

RECOMMENDATION ON PETITION FOR RECONSIDERATION

Based upon the above arguments, it is respectfully recommended that the Petition for Reconsideration be DENIED.

DATE: 6/1/2023

Dean Stringfellow
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE