WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOHNATHAN LOOPER, ***Applicant***

vs.

SCHUFF STEEL;
NATIONAL UNION FIRE INSURANCE COMPANY,
adjusted by AMERICAN INTERNATIONAL
INSURANCE GROUP, ***Defendants***

Adjudication Number: ADJ10058585
Oakland 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 determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*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 determinations. (*Id*.)

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/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 30, 2021

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

JOHNATHAN LOOPER
RAMOND E. FROST AND ASSOCIATES
LAW OFFICES OF SNELL & WILMER

PAG/abs

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

Applicant's Occupation:	Steel Worker
Applicant's Age at time injury:	28
Date of Injury:	May 26, 2015
Parts of Body Injured:	Lumbar spine & bilateral ankles
Identity of Petitioner:	Applicant
Timeliness of Petition:	Timely filed on May 29, 2021
Verification:	Petition was verified
Date of Order appealed:	May 6, 2021

INTRODUCTION

By timely and verified Petition for Reconsideration, filed May 29, 2021, applicant seeks reconsideration of my Finding of Fact that defendant's actions did not rise to the level of Serious & Willful Misconduct. Defendant-Employer has not filed an Answer as of the date of this Report and Recommendation. I recommend that the Petition for Reconsideration be denied

STATEMENT OF FACTS

Applicant commenced employment with Schuff Steel (hereinafter referred to as defendant) in October of 2014 as a journeyman ironworker. His job duties included unloading structural steel trucks, installing bolts into structural steel beams, signaling cranes, moving equipment and layout. He was hired without restrictions and was able to perform his usual and customary duties prior to the work injury.

On May 26, 2015, applicant was working at the Apple 2 construction site in Cupertino. The general contractor at the site consisted of a joint agreement between DPM Construction and Skanska (hereinafter referred to as DPM/Skanska). Defendant was a subcontractor at the site.

On the date of injury, applicant was directed to examine a section of the construction structure to determine whether the concrete pour was complete. To access the area, applicant climbed a wooden ladder up one floor. After applicant completed his evaluation, he descended the wooden ladder, while carrying a Hilti gun in one hand.

Prior to the injury, applicant attended safety meetings in which he was instructed not to carry tools in his hand as he ascended and descended ladders. This was because a worker must always maintain three points of contact with the ladder. To avoid carrying tools up and down ladders, workers were to use a rope next to the ladder.

Applicant testified at his deposition that it was his understanding that DPM/Skanska was responsible for the ladder and that it was common practice to climb ladders carrying tools in their

hands. He believed that he was able to maintain three points of contact with the ladder by placing his arm in the handle opening of the Hilti gun.

As applicant descended the ladder, he slipped and fell approximately thirteen feet to the ground. He landed on wooden debris at the foot of the ladder and seriously injured his feet and ankles. He tried to stand but was unable to do so.

Several workers came to his aid after the injury. Applicant recalled two female nurses who came from the medical clinic operated by DPM/Skanska at the construction site. The nurses removed applicant's shoes and socks and took his vital signs. They then put his socks and shoes back on, despite the condition of his ankles.

Applicant requested transportation to a hospital by ambulance but no ambulance was called. There were phone calls to the physician at the medical clinic and the doctor decided to have applicant transported to the nearest hospital by private automobile. Juan Carlos del Barco, a safety official for defendant, and another worker placed applicant in a "man basket" and took him from the job site by truck to O'Connor Hospital in San Jose.

Mr. del Barco accompanied applicant to the hospital. While applicant was awaiting treatment, Mr. del Barco completed a witness report for applicant. Mr. del Barco also prepared a "safety disciplinary report" that stated that applicant received a written warning for committing a safety violation by carrying the Hilti gun down the ladder. Mr. del Barco requested applicant to review and sign the documents (Defense Exhibits J and K).

At O'Connor Hospital, applicant came under the care of Dr. Kallie Stidham, who diagnosed applicant with bilateral ankle dislocations and fractures. Applicant underwent several surgeries by Dr. Stidham. Applicant was released from the hospital after several days. Applicant underwent several surgeries after his release.

Applicant filed a workers compensation claim with defendant's carrier, National Union Fire Insurance Company, whose claims were adjusted by American International Insurance Group (hereinafter referred to as AIG). AIG denied applicant's claim under a defense of intoxication.

Applicant retained Zachary Frost, Esq. of the Frost Law Offices on July 6, 2015. Mr. Frost filed an Application for Adjudication of Claim at the Oakland District office on August 3, 2015, alleging injury to the bilateral feet, bilateral ankles, left knee and low back.

Post-injury, applicant self-procured medical treatment from Kaiser Permanente, his private medical carrier. He had a course of physical therapy but progressed to a self-directed therapy program that greatly improved function. While applicant was confined to a wheelchair for several months, he was able to progress to being able to walk.

Due to dispute over injury AOE/COE and the defense of intoxication, the parties selected James Lessenger, M.D. to serve as Panel Qualified Medical Evaluator (PQME). Dr. Lessenger first evaluated applicant on December 16, 2015. In his report of that date, Dr. Lessenger concluded that applicant was at Maximum Medical Improvement Status (MMI) with an overall level of impairment of 83% Whole Person Impairment (WPI). According to Dr. Lessenger, the injury was industrial and there was no valid defense of intoxication. Applicant was precluded from full duty (Joint Exhibit 105, report of James Lessenger, M.D., dated 12/16/2015).

Defense counsel deposed Dr. Lessenger on May 18, 2016, primarily on the issue of whether applicant was intoxicated at the time of injury and, if so, was that intoxication a proximate cause

of the injury. Dr. Lessenger reiterated his opinion that as there was no blood testing done at the hospital and as all of the information concerning intoxication was anecdotal, there was no substantial medical evidence to support a defense of intoxication (Joint Exhibit 106, deposition of James Lessenger, M.D., dated 5/18/2016).

On May 22, 2016, applicant attorney filed a Petition for Serious and Willful Misconduct (S&W) against defendant, alleging that defendant's conduct after the fall and before the arrival at the hospital was actionable. Applicant attorney also alleged violations of two safety orders.

AIG obtained *sub rosa* films of applicant on January 13, 2017 and February 12, 2017 and forwarded the films to Dr. Lessenger for review. After review, Dr. Lessenger prepared a report, dated April 17, 2017, in which he determined that he needed to reexamine applicant to obtain updated range of motion measurements, as his prior rating was based upon measurements that no longer seemed applicable. Dr. Lessenger also opined that applicant was now able to work full duty without restriction (Joint Exhibit 102, report of James Lessenger, M.D., dated 4/17/2017)

Dr. Lessenger re-evaluated applicant on September 20, 2017. After conducting a physical examination, Dr. Lessenger noted that the range of motion measurements for applicant's ankles were identical to those taken at his first evaluation. Dr. Lessenger concluded that applicant had an 84% WPI, the same figure as assigned previously.

Dr. Lessenger noted that it was his opinion that the initial first-aid provided to applicant was "inappropriate" in that the nurses removed his shoes and socks and then put them back on. He also noted that applicant should have been transported to the hospital by ambulance. However, Dr. Lessenger could not conclude with reasonable medical probability that applicant's injury was worse due to the post-injury care provided before arriving at the hospital (Joint Exhibit 101, report of James Lessenger, M.D., dated 9/20/2017).

Applicant filed the Declaration of Readiness to Proceed (DR) on October 24, 2017 to which defense counsel objected due to the need for additional discovery. A Mandatory Settlement Conference was held before WCJ Christopher Miller on November 28, 2017 at which time the matter was set for trial over defendant's objection. Defense counsel filed a Petition to Remove WCJ Miller's decision to set the matter for trial, which was denied on March 8, 2018.

I conducted the trial on June 11, 2018. Applicant testified as well as Joel Becks, a safety officer for DPM Construction and Anthony Gubler, the investigator who shot the *sub rosa* footage. After the trial concluded, I determined that Dr. Lessenger's opinion as to permanent disability was unclear and I issued formal rating instruction to the Disability Evaluation Unit on July 27, 2018. Defense attorney objected to the instructions and I set the matter for Conference to address the dispute.

At conferences on September 18, 2018 and January 17, 2019, the parties engaged in settlement discussions in lieu of further litigation. At the second conference, the parties informed the Court that they had agreed to go to global mediation on all issues.

On March 19, 2019, the parties filed a Compromise & Release that resolved all aspects of applicant's claim except for the Serious and Willful Misconduct Petition for a gross sum of $190,000 "new money", less credit of $30,000 for the civil settlement received by applicant. Further trial dates were cancelled and the matter was taken off calendar.

Subsequent to resolution of the case-in-chief, the parties attempted to resolve the S&W petition but were unsuccessful. Applicant attorney filed a DR to try the S&W petition on January 29, 2020. I conducted a MSC on February 27, 2020 and the parties agreed to set the matter for trial on June 9, 2020.

However, due to the COVID-19 pandemic, the trial was not held until February 8, 2021. Anthony Hannon, defendant's safety director and Juan Carlos del Barco testified. The matter was submitted for decision as of March 1, 2021.

In my decision, I found that defendant's employees actions did not cause or contribute to applicant's injury or the residuals therefrom. Further, I found that none of the safety orders claimed violated by applicant were in fact violated by any of defendant's employees.

DISCUSSION

Petition for Serious and Willful Misconduct Benefits

Labor Code Section 4553 provides:

> "The amount of compensation otherwise recoverable shall be increased one-half, together with costs and expenses not to exceed two hundred fifty dollars, ($250) where the employee is injured by reason of the serious and willful misconduct of any of the following:
>
> (a) The employer, or his managing representative.
>
> (b) If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent thereof.
>
> (c) If the employer is a corporation, on the part of an executive, managing officer or general superintendent thereof.

In the seminal case of *Mercer-Fraser Co. v. Industrial Accident Com. (1953) 40 Cal.2d 102,* serious and willful misconduct is defined as conduct that "necessarily involves deliberate, intentional or *wanton* conduct in doing or omitting to perform acts, with the knowledge or appreciation of the fact, on the part of the culpable person, *that danger is likely to result therefrom*". "Wilfulness necessarily involves the performance of a deliberate act or intentional act or omission regardless of the consequences" (*Mercer-Fraser, supra at 117)*

"Willful misconduct means something different from and more than negligence, however gross. The term 'serious and willful 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, willful misconduct. It amounts only to simple negligence. To constitute willful 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 at 117)*

The basis for serious and willful misconduct has been aptly summarized as including three alternatives: "(a) a deliberate act for the purpose of injuring another; (b) an intentional act with knowledge that serious injury is a probable result; or (c) an intentional act with a positive and reckless disregard of its possible consequences. It follows that an employer guilty of serious and willful misconduct must know of the dangerous condition, knowthat [know that] the probable consequences of its continuance will involve serious injury to an employee, and deliberately fail to take corrective action" *(Johns-Manville Sales Corp. v. Workers' Compensation Appeals Bd (Horenberger)(1979) 96 Cal App.3d 932, 933 [44 Cal Comp Cases 878] citing Mercer-Fraser, supra; Hawaiian Pineapple Co. v. Ind. Acc. Com. (1953) 40 Cal2d 656; Dowden v. Industrial Acc. Com. (1963) 223 Cal.App.2d 124, 130-131)*

Furthermore, "the minimum level of care required of the employer to avoid being found guilty of serious and willful misconduct is not constant. As the peril to the employee intensifies, the minimum level of care required by the employer rises. Inattention to lethal danger may constitute serious and willful misconduct, while inattention to a mild hazard may only constitute negligence" *Dowden, supra at 223, Johns-Manville, supra at 934)*

What is essential to the legal analyses cited above is that it is the employer that is the party to whom a claim for serious and willful misconduct is brought. As this is applied to the facts in the current case, it is apparent that this requirement is lacking.

In considering the actions of the two employees for Schuff Steel, even gross negligence is not enough to establish liability; the conduct must be "quasi-criminal" in nature *(Bigge Crane & Rigging Co. v. Workers Comp Appeals Bd. (2010) 188 CalApp.4th 1330,1348-1354 [75 Cal Comp Cases 1089])* This standard of conduct required to prove Serious and Willful Misconduct by the employer is the same, whether the claim is based upon Labor Code Section 4553 or upon violation of a safety order under Labor Code Section 4553.1 (*Bigge, supra at 1355 citing Grason Electric Co. v. Industrial Acc. Com. (1965) 238 CalApp2d 46, 50-51 [30 Cal Comp Cases 363]*.

Applicant testified at deposition that he believed that DPM/Skanska was the entity that was responsible for the condition of the wooden ladder as well as the condition of the ground at the base of the ladder. While there is no expert testimony or evidence that cites the condition of the ladder as a contributory element of applicant's injury, there is some contention that the debris at the bottom of the ladder may have contributed to the seriousness of the injury.

If applicant had fallen on level ground, it is averred that the dislocations of both ankles may have been avoided. However, there is no expert evidence or testimony submitted at trial which confirms this contention.

The fact that Schuff Steel had no role in either the construction or placement of the wooden ladder or in the location of the debris at the bottom of the ladder means that it cannot be held liable due to any link between applicant's injury and a claim for serious and willful misconduct resulting from either the ladder itself or the debris at the bottom of the ladder.

I made the formal finding that defendant cannot be held liable for serious and willful misconduct relating to either the wooden ladder or to the debris at the bottom of the ladder as there is no link between the defendant and these facts. The contentions raised in Applicant's Petition do not lead me to amend this finding.

A second allegation by applicant as to liability for defendant is the removal of applicant's socks and shoes at the injury site by two nurses assigned to the medical clinic at the worksite. However, there is unrebutted testimony from Mr. del Barco and Mr. Hannon that Schuff Steel had no role in the organization and management of the employees at the medical clinic and that it was DPM/Skanska that controlled the medical clinic.

As a result, any actions taken by either the nurses assigned to the injury or the physician located at the medical clinic who conversed by telephone to the nurses cannot be imputed to Schuff Steel. I made the formal finding that defendant is not liable for serious and willful misconduct relating to the removal of applicant's shoes and socks at the injury site and there is no new information presented to lead to an alternative finding.

A final contention by applicant is that defendants' employee (Mr. del Barco) committed serious and willful misconduct by not calling for an ambulance and instead transporting applicant to the hospital by "man basket" and private vehicle. As discussed below, I find no merit in this contention.

Although there is at least a link between Mr. del Barco and defendant, initially it is noted that Mr. del Barcio was not an executive managing officer or general superintendent, as required by subsection (c) of the statute. There is no evidence or testimony that finds Mr. del Barco to qualify under this statute.

Second, Mr. del Barco testified that he was acting on the direction of the physician at the clinic in the decision to transport applicant to the hospital by private vehicle. As stated above, as the physician was an "employee' of DPM/Skanska, there is no link between the physican's [physician's] decision and the actions taken by Mr. del Barco.

Finally, there is no medical evidence presented that applicant's injury worsened due to the transportation of him by private vehicle. Although Dr. Lessenger stated it was "possible" that there was some worsening, he could not state with reasonable medical probability that applicant's condition was worsened due to this allegation.

Based upon the legal and factual analysis provided above, I made the formal finding that, while tragic, applicant injury was not caused or worsened by any actions taken or not taken by defendant's employees. Based upon this finding, I recommend that my ruling that defendant did not cause or contribute to applicant's injury and that defendant cannot be held liable for serious and willful misconduct be affirmed.

Violation of Safety Orders

Labor Code Section 4553.1 states:

> "In order to support a holding of a serious and willful misconduct by the 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 violation of the safety order did proximally 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 particularly 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"

Applicant cites four safety orders that he contends were violated by defendant's actions. I will address each safety order as they are pled.

8 CCR §1512-Provision of medical services

Applicant contends that defendant violated this order. As stated above, there was a medical clinic on site that was operated by DPM/Skanska. This clinic was open to all employees of all sub-contractors on the site. There is no obligation contained in the safety order of defendant to operate and maintain a separate medical clinic.

Applicant's contention appears to be that the care provided by the medical clinic fell below the standard of care, particularly as to the removal and replacing of applicant's shoes and socks. There is no medical evidence in evidence that states that applicant's injuries were worse due to this action.

Further, defendant has no responsibility whatsoever over the employees of the clinic. In addition, I find that Mr. del Barco's testimony credible as to the decision by Dr. Brown at the clinic to transport applicant to the hospital by private vehicle. Therefore, none of the actions by either Dr. Brown or the two nurses can be imputed to defendant.

I made the formal finding that defendant did not violate 8 CCR §1512 and recommend its affirmation.

8 CCR §1513 & 8 CCR §3276(e)(19)- Clear area of debris

Applicant contends that defendant violated these safety orders in that the debris at the bottom of the wooden ladder caused more extensive injury than if applicant had landed on level ground.

As stated above, I have made the finding that defendant had no role in the control or maintenance of the area below the ladder. This responsibility was entirely that of DPM/Skanska. As defendant had no control over this area, they cannot be cited for a safety order violation.

Based upon the credible testimony of Mr. del Barco and Mr. Hannon, I found that it was not defendant's responsibility or duty to keep the area clear at the bottom of the ladder. There is no rebuttal evidence in applicant's Petition to lead me to recommend a reversal of this finding.

8 CCR §3400-Provision of medical treatment

Applicant contends that defendant's conduct violated the safety order contained in 8 CCR §3400. However, as stated in defense counsel's post-trial brief, this safety order is a general safety order and not a construction safety order and not applicable to the present case.

Even if applicable, this safety order addresses the requirement of having ready medical personnel on site to provide immediate medical treatment. As stated earlier, I have made the finding that it was not defendant's obligation to have medical treatment provided on site as that obligation was met by DPM/Skanska's having two medical clinics on site.

Based upon the credible testimony of defendant's witnesses and due to the lack of any rebuttal from applicant, I made the formal finding that defendant did not violate this safety order and see no basis to amend this finding.

I recommend that applicant's Petition for Reconsideration be denied.

DATE: 6/8/2021

Jeffrey Friedman
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE