

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

JOSE LUIS ORTIZ, *Applicant*

vs.

**PUBLIC AUCTION R US;
EMPLOYERS INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ11073757
Fresno 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.*)

Finally, we remind applicant's attorney William Delaney that attaching documents that are already part of the record violates WCAB Rule 10842(c) (Cal. Code Regs., tit. 8, former § 10842(c), now § 10945(c)(1)-(2) (eff. Jan. 1, 2020).)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 29, 2021

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

**JOSE LUIS ORTIZ
LAW OFFICES OF WILLIAM DELANEY
MULLEN & FILIPPI
EMPLOYMENT DEVELOPMENT DEPARTMENT**

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

I

INTRODUCTION

1. Applicant's Occupation: Laborer
Age at Injury: 42
Date of Injury: 8/1/2016
Parts of Body Alleged Injured: Right knee
Manner in Which Injury Alleged Occurred: Treadmill base fell on his knee
2. Identity of Petitioner: Applicant
Timeliness: The Petition was timely filed on 1/27/21,
Verification: The Petition was Verified
3. Date of Order 1/8/21
4. Petitioner contends:
 - a. The testimony of Mr. Burciaga corroborates the applicant's claim that he was not injured while playing soccer but was injured at work.
 - b. The applicant was unable to produce Mr. Burciaga as a witness at the time of the original trial because he was unaware of Mr. Burciaga's involvement until after completion of the original trial.

II

FACTS

Applicant claims that he injured his right knee while he was moving a pallet of treadmill bases. The employer denied that the injury had occurred, claiming that the applicant had injured his knee while playing soccer. The matter proceeded to an AOE/COE trial with testimony extending over three trial days.

The applicant testified that on the day of his injury he had been using a pallet jack to move a pallet on which only the bases of four treadmills had been placed. (MOH/SOE, 1/15/19, pg. 5:9 - 11.) The treadmill bases were arranged on the pallet in a square with one facing each side of the pallet and with packing material in the center with a single wrap of plastic around them to hold them in place. (MOH/SOE, 1/15/19, pg. 9:10- 12; 11:20- 22.) The applicant testified that when he was maneuvering the pallet jack over a lip at the entrance to the warehouse, he maneuvered the palletjack handle to the left which placed the right side treadmill base in front of him. The base on the right side started to fall and he tried to brace it but the weight overcame him and he fell on his right knee. (MOH/SOE, 1/15/19, pg. 9:18 - 22; 5:4 - 14.) The applicant testified that the owner, Kirk Vartanian, saw the incident, ran over to help him and pushed the treadmill to the side so he could get out from underneath it. The applicant was able to get up but was limping. (MOH/SOE, 1/15/19; pg. 5:6- 8; 14 - 15.)

Mr. Vartanian denied being present when the applicant suffered any type of injury. He denied being present when a treadmill fell on the applicant and he denied lifting a treadmill off of the applicant. (MOH/SOE, 6/11/19, pg. 2:18-20.) Mr. Vartanian testified that it would be impossible to move a pallet containing four treadmills with a pallet jack as it would be too heavy. (MOH/SOE, 6/11/19, pg. 3:13 - 17.) Augustine Clark who was employed by Electric Recycling International was in charge of shipping treadmills to Public Auction R Us at the time of the alleged injury. He testified that treadmill ramps were not shipped separate from the control units unless they were a new treadmill which would be shipped in a box. The used treadmills would be shipped one or two on a pallet banded to the pallet and wrapped with plastic wrap. (MOH/SOE, 1/15/19, pg. 12:1 - 6.)

Mr. Vartanian testified that the applicant had said he had hurt himself playing soccer. (MOH/SOE, 6/11/19, pg. 4:20 - 22.) Mr. Vartanian testified that the applicant had asked for a referral to a doctor because he was having problems with his knee. He provided the referral but denied that he told the doctor's office that the treatment was work related. (MOH/SOE, 6/11/19, pg. 4:15 -22.) Yvonne Angulo who had been employed by Public Auction handling payroll at the time of the claimed injury, testified that the applicant had told her that he had suffered an injury from playing soccer. She had observed the applicant wearing a knee brace since the time she started working there in May of 2015. (MOH/SOE, 1/15/19, pg. 13:1 - 13.) Ms. Angulo was no longer employed by Public Auctions at the time of her testimony. (MOH/SOE, 1/15/19, pg. 12:24-25.)

The applicant testified that on the day of his injury he had started work at 8:00 a.m. on the prior day and worked until 2:00 a.m. on the day of his injury. He was paid by check for the time worked from 8:00 a.m. to 5:00 p.m. and then by cash for the time worked from 5:00 p.m. to 2:00 a.m. (MOH/SOE, 1/15/19, pg. 11:7 - 10.) The applicant was shown timecard dated 8/1/16 which showed he came to work at 8:00 a.m.; clocked out for lunch at 12:00 p.m.; clocked in again at 1:02 p.m. and clocked out at 5:22 p.m. and clocked in again at 8:08 the following morning. (MOH/SOE, 1/15/19, pg. 8:20 - 24.) He testified that somebody punched out for him, but he did not remember who. (MOH/SOE, 1/15/19, pg. 11:1 - 7.)

Mr. Vartanian testified that there were never occasions when either the time clock didn't work or employees were instructed to punch out and then were paid cash. All the employees were always paid by check. (MOH/SOE, 6/11/19, pg. 2:25 - 3:2.) Defendant's Exhibit E showed the alarm activity for the day of the claimed injury which showed that the alarm was disabled at approximately 7:35 a.m.

and was armed again at approximately 6:09 p.m. (Exhibit E, Customer Activity Report, 8/1/16.)

In weighing the credibility of the applicant against that of the defendant's witnesses, the undersigned found that the testimony of the defense witnesses was more credible and persuasive than the testimony of the applicant as to the events surrounding the claimed injury. On August 16, 2019, the undersigned found that applicant did not sustain injury arising out of and occurring in the course of employment to his right knee and ordered that he take nothing on his claim.

On September 3, 2019, Applicant filed a timely Petition for Reconsideration based upon newly discovered evidence that could not have been discovered or produced at trial with reasonable diligence. (Applicant's Petition for Reconsideration of WCAB Order Dated August 16, 2019, 9/3/19)

The Petition included a Declaration of Ralph Burciaga In Support of Jose Luis Ortiz's Petition for Reconsideration. The Declaration included, among other statements, that Mr. Burciaga had observed a treadmill on top of the applicant and had helped free the applicant from the treadmill. (Declaration of Ralph Burciaga, 9/3/19, pg. 2:5 - 9.)

The Petition also included a Declaration of the Applicant which stated that after receiving the Findings of Fact, Order and Opinion on Decision on or about August 20, 2019, the applicant chanced to meet an unnamed prior co-worker who gave him the name of another prior co-worker named Jesus or "Chuy" who gave him the name of another prior co-worker, Ralph Burciaga, who had been present on the day of the claimed injury. (Declaration of Jose Luis Ortiz In Support of Applicant's Petition for Reconsideration, 9/3/19, pg. 2:4-3:9.)

On September, 17, 2019, the undersigned issued an Order Rescinding Findings of Fact, Orders, and Opinion on Decision Pursuant to 8 CCR §§ 10856 and 10859. The matter was set for further testimony on October 13, 2020.

At the second trial the applicant testified that he was unable to identify any additional witnesses prior to the first trial because he didn't know who else had been working that day and he had no way of contacting any co-employees because they no longer worked for his employer. (MOH/SOE, 10/13/20, pg. 2:22- 23; 4:10 - 13.) The applicant testified that he happened by chance to run into Chuy and Elizabeth Delaney after the initial trial and they gave him Ralph Burciaga's name. (MOH/SOE, 10/13/20, pg. 3:4 - 8; 5:2 - 3.) The applicant testified that he never asked his employer to provide him with names of potential witnesses or their addresses. (MOH/SOE, 10/13/20, pg. 4:13 -15.)

Mr. Burciaga testified that prior to the accident he had helped the applicant by steadying the treadmills on the pallet and helping him push it over the hump in the doorway. He then returned to his prior job of cleaning when he heard a commotion and saw the applicant lying on the ground with the treadmill on top of him. Mr. Burciaga ran over and lifted the treadmill off of the applicant while Kirk picked him up off the floor. (MOH/SO, 10/13/20, pg. 6:3 - 8.)

Following the second trial, the undersigned found that Applicant had failed to show why the alleged new evidence of the testimony of Ralph Burciaga could not have been produced prior to the matter going to trial and that even if the testimony could not have been previously produced, it was not found to be credible, as it contradicted the prior testimony provided by the applicant. The undersigned ordered the applicant take nothing on his claim for industrial injury.

It is from these findings and order that the applicant now seeks reconsideration.

III

DISCUSSION

The WCJ is empowered to resolve conflicts in the evidence and to make credibility determinations. On issues of credibility and reliability of witnesses, the WCJ's findings are accorded great weight and should be rejected only on the basis of contrary evidence of considerable substantiality. (*Lamb v. WCAB* (1974) 39 CCC 310.)

Applicant contends that the testimony of Mr. Burciaga corroborated the applicant's prior testimony and as such the evidence is contrary to the findings of facts. However, the mere fact that Mr. Burciaga testified in support of the applicant's version of the events surrounding the claimed injury does not constitute evidence of considerable substantiality needed to overcome the trial judge's credibility determination.

The determination that the defendant's witness' testimony was more persuasive and credible than that of the applicant was supported by the testimony of Augustine Clark and Yvonne Angulo neither of whom had an incentive to make misrepresentations. Mr. Clark testified credibly that treadmills were never transported in the manner described by the applicant. This testimony is consistent with good business practices that expensive equipment would be adequately secured to the pallet on which they are being transported. Ms. Angulo was no longer employed by the defendant and had no reason to prevaricate. She provided credible testimony that the applicant had often spoken about playing soccer and had admitted to injuring his knee while playing soccer. This testimony was found to be more credible than the applicant's testimony that he had not played soccer since he was 20 years old, but had continued to coordinate games for friends and had done volunteer work commenting on soccer games from 2012 to 2014 (at which time he was 38 to 40 years old). (MOH/SOE, 1/15/19, pg. 7:21 -25.)

Applicant's testimony that he had sustained his injury while working until 2 a.m. was also not found to be credible in light of the contradictory documentation contained in the time cards and the alarm Customer Activity Report. (Exhibits E and G.)

Applicant's testimony about the series of coincidences that led to him discovering Mr. Burciaga as a witness was also less than completely credible. The applicant stated in his Declaration that it was not until after he received the Findings of Fact, Order and Opinion on Decision on or about August 20, 2019, that he just happened to come into contact with an unidentified prior co- worker who provided him with contact information for Jesus, AKA "Chuy", who then told him about Mr. Burciaga. (Declaration of Jose Luis Ortiz in Support of Applicant's Petition for Reconsideration, 9/3/19, pg. 2:17 - 3:9) However, at trial the applicant testified that he ran into Chuy by chance when he went to Chuy's father's house because he did not have his phone number. (MOH/SOE, 10/13/20, pg. 3:1 - 6; 5:5 - 17.) Mr.

Burciaga testified that both Chuy and Jose Guzman, with whom Applicant had been in contact, had his phone number. (MOH/SOE, 10/13/20, pg. 8:10- 11.) However, the applicant testified that he remembered where Mr. Burciaga used to live and when he went there he just happened to run into a friend of Mr. Burciaga who gave him the phone number. It seems to the undersigned that there were a lot of co-incidences that just happened to occur between the time the decision was issued and the time in which to file a Petition for Reconsideration.

Applicant contends that it is understandable that the applicant would not remember or have noticed that Mr. Burciaga helped lift the treadmill. However, the applicant testified in great detail as to not only the arrangement of the treadmills on the pallet but also as to how he had to turn the handle of the pallet jack to the left in order to maneuver it over the entrance threshold. He also testified that Mr. Vartanian pushed the treadmill so the applicant was able to get out from under it and stand on his own. (MOH/SOE, 1/15/19, pg. 5:6 - 15; Exhibit 5, Deposition transcript of Applicant, 2/28/18, pg. 17:1 - 15.) This testimony is materially different from Mr. Burciaga's testimony that it was Mr. Burciaga who lifted the equipment off of the applicant while Kirk picked the applicant up off the floor. (MOH/SOE, 10/13/20, pg. 6:4 - 5.) While it is possible that the applicant might not have noticed an additional person moving the equipment, it seems unlikely that he would have confused being able to get himself out from under the equipment and stand on his own from being pulled out and "scooped up like he was a baby".

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

DATED: 2/9/21

DEBRA SANDOVAL

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE