

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

NICHOLAS NOSCE, *Applicant*

vs.

**UNITED BUILDING CONTRACTORS INC;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ16374323
Sacramento 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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 15, 2024

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

**NICHOLAS NOSCE
ABRAMSON LABOR GROUP
STATE COMPENSATION INSURANCE FUND, LEGAL**

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**

1. Applicant's Occupation: Roofer
Applicant's Age: 27
Date of Injury: January 31, 2022
Parts of Body Injured: Left elbow
Mechanism of Injury: Specific
2. Identity of Petitioners: Defendant
3. Timelines: Yes
4. Verifications: Yes
5. Decision Date: December 13, 2023, Findings of Fact and Opinion on Decision issued
6. Defendant's Contentions: Defendant contends that by Order, Decision or Award, made and filed by the Workers' Compensation Judge, the Appeals Board acted without or in excess of its powers; the evidence does not justify the Finding of Fact; and that the Findings of Fact do not support the Order, Decision or Award

INTRODUCTION

FACTS

1. Nicholas Nosce (applicant) was born on XX-XX-XXX.
2. On January 31, 2022, applicant was employed by United Building Contractors, Inc., (defendant employer) as a roofer.
3. At the time of injury, applicant was 27 years old.
4. On January 31, 2022, defendant employer was insured by State Compensation Insurance Fund.
5. On January 31, 2022, applicant and his co-worker, Leonardo Diaz, (Mr. Diaz) had a physical altercation on the roof of the Butte County Jail. (MOH/SOE at pp. 5:28-29; 15:4.)
6. On January 31, 2022, applicant was a new and inexperienced roofer. (*Id.* at pp. 6:37; 13:16-20.) Mr. Diaz was a more experienced roofer. (*Id.* at pp. 4:30; 13:11-13.)
7. Applicant made a work mistake on the roof. (*Id.* at pp. 5:6-7; 14:1.)
8. Mr. Diaz ordered applicant off the roof. (*Id.* at pp. 5:23; 14:36-39.)

9. Mr. Diaz testified that applicant came into his personal space and caused him fear of bodily harm. (*Id.* at pp. 14:42-45; 15:27-28; 16:12-13; 16:35-38; 17:29.) Mr. Diaz' testimony about applicant getting into his personal space and causing him fear is not credible.
10. Mr. Diaz, not applicant, threw the first punch. (*Id.* at pp. 5:28-29; 16:33.)
11. On January 31, 2022, applicant sustained an injury arising out of and occurring during the course of employment to the left elbow.
12. Applicant's claim is not barred under Labor Code §3600(a)(7) as applicant's injury did not arise out of an altercation where applicant was the initial physical aggressor.

DISCUSSION

First, defendant contends that its due process rights were violated because the WCJ "refused" to allow testimony from applicant about past relevant events including him assaulting a female store clerk and him assaulting and battering his teenaged sister. The representation by defendant is inaccurate. Over the applicant's objection, defendant was allowed to question applicant about his prior convictions and offer the following evidence:

In 2020, applicant assaulted a clerk at Porterville. Applicant did not hit the clerk.¹ He knocked coffee cups down because she would not sell him coffee because he was not wearing a mask. Applicant was convicted for this incident. (MOH/SOE at p. 8:42- 45.)

In 2017 or 2018, applicant was convicted of assaulting his younger sister...In a public place, applicant took back the phone he gave her. The police were called. The applicant left marks on his sister's arm where he restrained her. Applicant leg swept his sister to stop her from hitting him. (MOH/SOE at p. 9:1-8.)

Furthermore, over applicant's objection, Exhibit A, an article about applicant's 2020 assault on the store clerk was admitted into evidence. The applicant admitted to assaulting a store clerk and assaulting and battering his younger sister. Based on this evidence, it is undisputed that applicant has a propensity for violence against women. As such, defendant's

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Applicant did hit the store clerk with coffee. (Exhibit A.)

desire to prove applicant's psychological tendency to violence against women was clearly established without the need to belabor the point.

CREDIBILITY OF WITNESSES

In a bench trial, the trial court is the “sole judge” of witness credibility. (*Davis v. Kahn* (1970) 7 Cal.App.3d 868, 874.) The trial judge may believe or disbelieve uncontradicted witnesses if there is any rational ground for doing so. (*Id.*) The fact finder's determination of the veracity of a witness is final. (*People v. Bobeda* (1956) 143 Cal.App.2d 496, 500.) Credibility determinations thus are subject to extremely deferential review. (*La Jolla Casa deManana v. Hopkins* (1950) 98 Cal.App.2d 339, 345–346 [“[A] trial judge has an inherent right to disregard the testimony of any witness... The trial judge is the arbiter of the credibility of the witnesses”].) (*Schmidt v. Superior Court* (2020) 44 Cal.App.5th 570, 582 [emphasis added].)

Furthermore, in workers' compensation proceedings, a WCJ's credibility determinations are “entitled to great weight because of the [WCJ's] ‘opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand’ [Citation.]” (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)

Applicant's Testimony

Initially, Mr. Diaz was about 15' feet away from applicant working on his knees. (MOH/SOE at p. 7:38-39.)

Applicant called Mr. Diaz over to look at the mistake he made on the roof. (*Id.* at p. 7:39-41.) As they looked at the mistake together, applicant was standing to the right of Mr. Diaz who was 1½ arm's length away from him. (*Id.* at p. 5:26-28.) As words were exchanged, Mr. Diaz stepped to applicant and started punching him. (*Id.* at p. 5:28-29.) Applicant fell to his knees. (*Id.* at p. 5:29.) Mr. Diaz kept punching applicant and kicked his ribs on the left side. (*Id.* at p. 5:29-30.) Mr. Diaz took off applicant's toolbelt. (*Id.* at p. 5:30-31.) The fight lasted 20 to 30 seconds. (*Id.* at p. 8:29.) The fight stopped because guards from below yelled “Stop!” (*Id.* at p. 8:29-30.)

Leonardo Diaz' Testimony

Mr. Diaz was at the edge of the HVAC unit. (MOH/SOE at p. 14:41-42.) Applicant, who was aggressive, angry, muttering, and threatening, approached Mr. Diaz. (*Id.* at p. 14:41; 14:44-45.) Applicant got into Mr. Diaz' personal space. (*Id.* at p. 14:42-43.) Mr. Diaz felt the threat of bodily harm from applicant. (*Id.* at pp. 14:42-45; 15:27-28; 16:12-13; 16:35-38; 17:29.) Mr. Diaz pushed applicant back to get him out of his personal space. (*Id.* at p. 15:1.) Then, applicant charged Mr. Diaz. (*Id.* at p. 15:1-2.) Mr. Diaz hit applicant and he fell. (*Id.* At p. 15:4-5.) Mr. Diaz also fell because he tripped over some items on the floor of the roof. (*Id.* at p. 15:5-6.) Applicant and Mr. Diaz wrestled or scuffled on the roof. (*Id.* at p. 15:6-7.) Mr. Diaz punched applicant at least three times. (*Id.* at p. 17:16-17.) The incident lasted up to five minutes. (*Id.* at p. 16:41-42.)

The applicant's testimony about the altercation is not credible. Mr. Diaz' testimony about the altercation is not credible. Both applicant and Mr. Diaz provided conflicting testimony which portrayed him in the most favorable light. The limited testimony from applicant and Mr. Diaz that is the same is considered a fact.

Part of the credibility determination in this case was seeing applicant and Mr. Diaz in person. Applicant is slightly shorter than Mr. Diaz, but much heavier. ²The applicant's weight is not muscle weight; he is unfit/fat. Mr. Diaz' weight, though less, is muscle weight; he is fit. Physically, Mr. Diaz is stronger and clearly capable of winning a physical altercation between the two men. In light of this obvious disparity in physical fitness and strength, on day of trial, applicant's attorney even asked Mr. Diaz if he works-out; Mr. Diaz said no. (*Id.* at p. 16:13.)

With this in mind, defendant's initial aggressor defense fails. Specifically, Mr. Diaz testified at length that the physical part of the altercation began when applicant got into his personal space or "bubble" and made him fearful or afraid of harm. (MOH/SOE at pp. 14:42- 45; 15:27-28; 16:12-13; 16:35-38; 17:29.) Based on the physical appearance of applicant and Mr. Diaz, the undersigned does not believe Mr. Diaz was afraid of this applicant at any point during their brief working relationship and ongoing. This lack of fear and knowledge of his superior, physical capabilities is reflected in the fact that at least twice, Mr. Diaz testified that he fell to the ground during the altercation because he tripped (*Id.* at p. 15:5-6; 17:13-14) not because the applicant physically took him down.

² Applicant is 5'7" tall and 245 pounds; Mr. Diaz is 5'9' tall and 195 pounds. (Exhibit AA at p. 3.)

Furthermore, the undersigned does not believe this applicant stepped to Mr. Diaz and got into his personal space. The altercation occurred at 11:25 a.m., an investigation of the altercation began at 11:26 a.m., and a police report was filed. (Exhibit AA.) Mr. Diaz did not contemporaneously report that applicant first got into his personal space causing him fear. (Exhibit AA at p. 5.) Deputy LaRue heard the loud verbal argument between applicant and Mr. Diaz. (*Id.* at p. 6.) Deputy LaRue heard Mr. Diaz tell applicant to go home. (*Id.*) Deputy LaRue saw Mr. Diaz walk towards applicant. (*Id.*) Deputy LaRue did not see who threw the first punch, (*Id.*) but we know that Mr. Diaz did. (MOH/SOE at pp. 5:28-29; 16:33.)

Defendant argues the undersigned erred in relying on the statement of Deputy LaRue, Butte County Sheriff[']s Office investigative report. (Exhibit AA.) Generally, the proceedings are not bound by the common law or by statutory rules of evidence and procedure but the court may make inquiry in the manner, through oral testimony and records, that is best calculated to ascertain the substantial rights of the parties. (Labor Code §§ 5708, 5709; see also, *Gill v. Workers' Comp. Appeals Bd.* (1985) 167 Cal.App.3d 306, 310 50 Cal.Comp.Cases 258.) This rule allows for significant latitude in the admission of relevant evidence. Then, once admitted the weight and sufficiency of the evidence are matters to be determined by the trier of fact and more weight may be given to the evidence presented by one party as opposed to the evidence presented by another. (Labor Code, § 5312; Cal. Code Regs., tit. 8, § 10348; see also *Clendaniel v. Industrial Acc. Com.* (1941) 17 Cal.2d 659, 6 Cal.Comp.Cases 85.)

Exhibit AA was offered jointly by the parties. The document was prepared by a law enforcement officer after a contemporaneous investigation. Deputy LaRue is not only a law enforcement officer, but also the best non-party witness available. Furthermore, defendant was given an opportunity to call witnesses on day of trial—defendant rested. Deputy LaRue heard applicant and Mr. Diaz arguing, he looked up and saw Mr. Diaz approaching applicant followed by punches—this was not a great span time and more clearly aligns with applicant's assertion that Mr. Diaz approached him and punched him. Hence, Mr. Diaz' repeated, adamant testimony that applicant stepped to him, got into his personal space or "bubble" and caused him fear is found not credible.

CONCLUSION

For the foregoing reasons, I recommend that the Petition for Reconsideration be denied.

DATE: January 19, 2024

Sarah L. Lopez

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE