WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

HAMIDULLAH SARWARY, *Applicant*

vs.

WALGREENS FAMILY OF COMPANIES; ZURICH AMERICAN INSURANCE administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Numbers: ADJ8258390, ADJ8246247, ADJ9024430
Oxnard District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Joint Findings of Fact and Award (F&A) issued on May 3, 2021, wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that (1) defendant denied applicant's return to work following resolution of his industrial injury claims in violation of Labor Code[1] section 132a; (2) applicant is entitled to an increase of compensation of $10,000.00, plus costs in the amount of $250.00 and lost wages in an amount to be adjusted by the parties and subject to proof; and (3) applicant's attorney is entitled to attorney's fees of fifteen percent of applicant's recovery on his section 132a claim. The WCJ awarded applicant increased compensation and attorney's fees as set forth in the findings.

Defendant contends that (1) the WCJ erroneously failed to admit Exhibit G, which contains evidence of applicant's prior felony convictions, into evidence; (2) applicant was medically unfit to return to his position; and (3) applicant abandoned his position.

We received an Answer from applicant.

The WCJ filed a Report and Recommendation on Reconsideration (Report) recommending that the Petition be granted in order to admit Exhibit G into evidence and otherwise be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons expressed in the Report, which we adopt and incorporate herein, we will grant reconsideration and, as our Decision After

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

Reconsideration, we will affirm the F&A, except that we will amend to admit Exhibit G in evidence.

FACTUAL BACKGROUND

For purposes of the present dispute, the parties have stipulated that applicant sustained injury on December 13, 2011. (Minutes of Hearing and Summary of Evidence, February 3, 2021, p. 2:8-9.)

On November 25, 2015, the parties resolved applicant's cases in chief by way of Compromise and Release. (Minutes of Hearing and Summary of Evidence, January 18, 2017, p. 2:5-6.)

On June 24, 2016, applicant filed his section 132a petition, alleging that he "resolved his claims by compromise and release 11/25/2015 and was thereafter terminated from his employment." (Labor Code Section 132a Claim, June 24, 2016, p. 1.)

On January 18, 2017, the matter proceeded to trial as to applicant's section 132a petition. (*Id*., p. 2:6-7.)

On February 3, 2021, and as further explained in the Report, the matter returned from the Appeals Board for further trial as to the section 132a petition. (Minutes of Hearing and Summary of Evidence, February 3, 2021, pp. 1-2:19.)

Defendant sought admission of Exhibit G, a decision of the Court of Appeals, Second Appellate District, Number B286186, dated March 27, 2019. (*Id*., p. 4:14-16.) The WCJ declined to admit Exhibit G into evidence. (*Id*.) The contents of Exhibit G state that applicant was convicted of felony sexual assaults committed in July 2013 and felony false impersonation committed in August 2007. (Exhibit G, Court of Appeals, Second Appellate District, Number B286186, March 27, 2019, pp. 1-5.)

At trial, applicant testified that he was arrested in December 2013, but not convicted until August 2017. (*Id*., p. 7:2-4.) He was jailed for less than twenty-four hours following his arrest, and defendant did not impose conditions upon his employment after he posted bail. (*Id*., pp. 7:2-8:22.) His incarceration for the July 2013 felonies began after his August 9, 2017 conviction. (*Id*., p. 7:2-4.)

DISCUSSION

We turn first to defendant's contention that the WCJ erroneously failed to admit Exhibit G into evidence. More specifically, defendant argues that the decision of the Court of Appeals, Second District, Case Number B286186, dated March 27, 2019, describes applicant's felony convictions and thus constitutes evidence admissible for the purpose of proving applicant's lack of credibility and lack of actual wage loss.

Here we observe that evidence of prior felony convictions is considered probative and admissible as to the issue of witness credibility. (See *Boeken v. Philip Morris, Inc.* (2004) 122 Cal.App.4th 684, 727; see also Evid. Code, § 788 [evidence of witness's prior felony conviction admissible for the purpose of attacking witness's credibility].) We also observe that evidence of prior felony convictions may tend to prove disqualification from certain positions of employment and thus may be admissible for the purpose of disproving wage loss claims, depending upon the surrounding circumstances.

Here, Exhibit G, the March 27, 2019 decision of the Court of Appeals, Second District, Case Number B286186, states that applicant was convicted of felony sexual assaults committed in July 2013 and felony false impersonation committed in August 2007. (Exhibit G, Court of Appeals, Second Appellate District, Number B286186, March 27, 2019, pp. 1-5.) It therefore constitutes evidence of prior felony convictions; and, as such, is admissible for the purpose of attacking applicant's credibility. Thus, we agree with the opinion of the WCJ, as expressed in the Report, that Exhibit G should have been admitted in evidence. (Report, p. 3.) Accordingly, we will amend the F&A to admit Exhibit G in evidence.

Nevertheless, we concur in the WCJ's opinion that the addition of Exhibit G into the record does not affect the outcome of the F&A. (Report, p. 3.) More specifically, as the WCJ states in the Report, applicant testified on three occasions as to the facts and circumstances surrounding his section 132a and industrial injury claims; applicant's testimony was consistent and credible throughout; and defendant proffered no testimonial, documentary or other evidence to refute applicant's section 132a claim. (Report, pp 3-4.) Because we accord the WCJ's credibility determination great weight, and because the record contains no evidence refuting applicant's testimony, we conclude that the evidence of applicant's prior felony convictions is insufficient by itself to discredit his testimony herein. (See *Garza v. Worker's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].)

As to defendant's contention that Exhibit G disproves applicant's wage loss claim, we note that there is no evidence to suggest that applicant was disqualified from employment with defendant based upon the 2007 felony conviction. (Exhibit G, Court of Appeals, Second Appellate District, Number B286186, March 27, 2019, pp. 1-5.) To the contrary, defendant admits that it employed applicant when he sustained injury on December 13, 2011. (Minutes of Hearing and Summary of Evidence, February 3, 2021, p. 2:8-9.) Similarly, there is no evidence that applicant's 2017 conviction disqualified him from employment with defendant during the period of December 9, 2015, the date the WCJ determined was the effective date of his termination, until August 9, 2017, when applicant was convicted and incarcerated. (Report, p. 3; Minutes of Hearing and Summary of Evidence, February 3, 2021, p. 7:2-4.) Accordingly, we concur with the WCJ that applicant is entitled to lost wages subject to proof in an amount to be adjusted by the parties. (Report, p. 3.)

Regarding defendant's contentions that applicant was medically unfit to return to his position and that he abandoned his position, we agree with the reasoning of the WCJ that evidence showing that defendant (1) terminated him upon settlement of his industrial injury claims; and (2) ordered him to clean out his locker and desk two weeks after returning to work after settlement of his claims, provides sufficient grounds to establish applicant's prima facie case. (Report, pp. 3-4.) Moreover, since defendant failed to proffer evidence that its conduct was necessitated by business realities, there is no evidentiary basis to conclude that applicant was terminated because he was medically unfit or because he abandoned his position. (Report, p. 4.)

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will affirm the F&A, except that we will amend to admit Exhibit G in evidence.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Joint Findings of Fact and Award issued on May 3, 2021 is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings of Fact and Award issued on May 3, 2021 is **AFFIRMED**, except that it is **AMENDED** as follows:

JOINT FINDINGS OF FACT

* * *

6. Exhibit G is admitted in evidence.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 27, 2021

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

HAMIDULLAH SARWARY
LAW OFFICES OF ALAN FENTON
TESTAN LAW

SRO/oo

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

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1.	Applicant's Occupation		:	Manager
	Applicant's DOB		:	November 15, 1969
	Dates of Injury		:	12/13/11; 5/15/11; 3/4/13
	Parts of Body Injured	:		Neck; trunk; upper extremities; Lower extremities; low back; Lumbar spine
	Manner in Which Injury Occurred		:	Not in dispute
2.	Identity of petitioner	:		Defendant
	Timeliness		:	The petition is timely
	Verification		:	The petition is verified
3.	Date of Issuance of Decision	:		April 23, 2021
4.	Petitioners Contention	:		The Court erred in finding a L.C. § 132(a) violation

II
FACTS

Applicant was the sole witness at trial and provided the only chronology of events with regards to his employment with Walgreens. Applicant was employed by Walgreens for approximately ten years. He sustained three industrial injuries; December 13, 2011, May 5, 2011 and March 4, 2013. He went off work due to the March 4, 2013 injury and never returned to his employment with Walgreens.

The three claims were resolved by way of Compromise & Release on November 25, 2015 and specifically provided that Applicant did not have to resign his employment as a condition for the Compromise & Release.

In mid May 2016, Applicant returned to Walgreens to advise he was ready to return to work. A new manager advised Applicant that the manager would have to make some calls. Two weeks later, the manager asked Applicant to come into the store and advised Applicant he was no longer in the "system" and Applicant had to clean out his locker and desk.

No termination letter was ever sent nor was there any explanation as to why Applicant was terminated.

A conversation with a prior manager at an unknown time resulted in Applicant being advised that Walgreen's could not accommodate the work restrictions imposed by the physician. After Applicant had the physician remove those restrictions, Applicant was advised by that same manager, Applicant would be considered as soon as a position was available.

Following the determination Applicant failed to prove he was terminated, Applicant sought reconsideration.

The WCAB remanded the matter back to the WCJ for development of the record.

III
DISCUSSION

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cure that defect.

Defendant contends that the WCJ improperly excluded as an exhibit, the Court of Appeals Second Appellate District No. B286186 dated March 27, 2019. Defendant is correct and the document should have been admitted into evidence. However, it would have no bearing on the decision made by the WCJ.

Applicant has testified three (3) times before this WCJ. Applicant proceeded to trial on his L.C. § 132(a) claim prior to his incarceration. He testified consistently with his prior testimony and a prior AOE/COE trial in which was found based in part on the credible testimony of applicant with due regard for his demeanor as a witness. Nothing changed in the most recent trial. However, I agree the exhibit should have been admitted into evidence.

At the most recent trial, applicant testified and the only rebuttal by defendant was cross examination of applicant and defendant did not present any employer witnesses.

In its remand to the WCJ, the WCAB stated as follows:

> "In the present case, applicant contends that defendant singled him out for disadvantageous treatment by terminating his employment after he agreed to resolve his cases in chief. Here we observe that an employer who discharges an employee because the employee received a workers' compensation settlement is in violation of section 132a and that evidence demonstrating a close temporal proximity between the settlement and the discharge may serve to establish the employee's prima facie claim. (§ 132a; see, e.g., Arteaga v. Brink's, Inc. (2008) 163 Cal.App.4th 327, 353)."

Again at the most recent trial, applicant testified that he had been off work since at least 2014 without having received a termination letter, he also testified that in May 2016 when he returned to work after receiving his settlement between one week and a few weeks), defendant told him he was no longer in the system and instructed him to clean out his desk and locker.

Defendant effectively ordering applicant to remove his personal effects from his place of work together with the above supports a finding Applicant was, in fact, terminated from his employment at Walgreens as of December 9, 2015. This is in-between one week and a few weeks.

Again, as the WCAB stated,

> Furthermore, evidence of a close temporal proximity between applicant's receipt of a settlement (or return to work following settlement) and his discharge may be found in the record before us. In particular, defendant's December 1, 2016 letter asserts that applicant's employment ended on November 25, 2015, the very date of applicant's receipt of settlement, suggesting that defendant may have terminated applicant immediately after settlement. (Ex. 27, Cover Letter, December 1, 2016; Compromise and Release, November 25, 2015, p. 6.) Moreover, applicant's testimony that defendant instructed him to clean out his locker and his desk two weeks after he returned to work following settlement evidences a close temporal proximity between applicant's return to work following settlement and discharge.

Therefore, applicant has presented a prima facie case for a L.C. § 132a violation. The burden then shifts to defendant to show another reason for the termination and/or to present evidence of good faith business necessity. The employer must show that its actions were ". necessitated by "the realities of doing business"

No evidence documentary, testimonial or other evidence, refuted applicant's prima facie showing of being singled out in retaliation for having filed a workers' compensation claim.
Based on defendant's lack of offering any reason for applicant's termination it is found applicant has proved up his L.C. § 132a violation.

IV
RECOMMENDATION

It is respectfully recommended that Defendant's Petition for Reconsideration be granted in part for the admission of the Second Appellate District records, but denied as to all other issues raised based on the merits and for the reason stated above.

Scott Seiden
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE