WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GLENDON BRIJLALL, *Applicant*

vs.

LUSIVE DÉCOR, INCORPORATED, *Defendant*

Adjudication Number: ADJ10895307
Long Beach District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision 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 and Opinion on Decision, which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 19, 2022

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

GLENDON BRIJLALL
BRUNDO LAW

PAG/ara

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

Dates of Injury: 09/30/2016

Age on DOI: 57

Parts of Body Claimed Injured: neck, back, bilateral upper extremities, bilateral lower extremities, psyche, sleep, Parkinson's, ENT, respiratory, TMJ

Identity of Petitioner: Applicant, in Pro Per

Timeliness: The petition was timely filed and served on February 18, 2022.

Verification: The petition was verified.

Date of Finding of Fact: February 3, 2022.

Petitioners Contentions: Petitioner contends that (1) he met the burden of proof to establish the elements of a serious and willful claim, (2) additional documents should be admitted into the record, and (3) the undersigned omitted documents from evidence.

II
FACTS

This matter had been set for trial on multiple occasions with lengthy discussions with the parties as to the issues, burdens of proof, documentary evidence, and witness testimony. On December 21, 2021, the above case proceeded to trial on the sole issue of whether the Petitioner sustained a serious and willful claim. After a review of the two deposition transcripts of the Petitioner[1] and the exhibits offered, the undersigned found that the Petitioner did not meet the burden of proof to establish the elements of a serious and willful claim. It is from this Finding of Fact that the Petition for Reconsideration is sought.

III
DISCUSSION

PETITIONER MET THE BURDEN TO PROVE THE ELEMENTS OF A SERIOUS AND WILLFUL CLAIM

Petitioner contends that he met the burden of proving the elements of a serious and willful claim. As stated in the Opinion on Decision, the Petitioner has the affirmative burden to show that the employer: (1) knows of the dangerous condition; (2) knows that the probable consequence of its continuance will involve serious injury to the employee; and (3) deliberately fails to take corrective action. (See *Johns-Manville Sales Corp. v. WCAB (Horenberger)* (1979) 44 CCC 878, 883). There

[1] It should be noted that on the date of trial, the parties stipulated that in lieu of Petitioner's testimony, the two deposition transcripts of the Petitioner would be utilized.

is a higher standard for proving a serious and willful injury as there must be evidence to show that the employer affirmatively put the Petitioner in harm's way. After a review of the Petition for Reconsideration, the attached additional documents and a re-review of the evidence, the Petitioner only offers his version of what he considers to be a serious and willful injury without any collaborating evidence. It is apparent that the Petitioner has issues with the way he was treated while working for the employer. However, these issues simply do not rise to the level of a serious and willful injury. Many of Petitioner's arguments fall towards the burden of proving injury arising out of and in the course of employment but this was not the issue in the case at hand.[2]

ADDITIONAL DOCUMENTS SHOULD BE ADMITTED INTO THE RECORD

Petitioner contends that additional documents should be admitted into the record and wishes to offer recent medical records and internet reviews of current and former employees of the employer. Regarding the medical records, these are not relevant to discussion of a serious and willful injury and would be appropriate if this were a trial on injury arising out of and in the course of employment. Regarding the internet reviews of the employer by current and prior applicant attorneys, these reviews are hearsay records that offer no probative value to the case at hand. It is simply unknown who wrote these reviews, what the motivation was for writing them, or the context for which these reviews were written. Further, the tenant of due process would be violated as the defendant has no way to cross-examine the reviewers. Petitioner had the opportunity to call witnesses to collaborate his claims of a serious and willful injury but chose not to.

THE UNDERSIGNED OMITTED DOCUMENTS FROM EVIDENCE

Petitioner contends that the undersigned omitted documents from evidence. This contention is wholly without merit as the parties appeared in front of the undersigned on five separate trial dates since the beginning of 2021. At every trial setting, there were changes to the exhibit list by both parties but the undersigned always afforded the parties every opportunity to offer whatever documents they wished to offer. Finally, during the trial, after the requested evidence was read into the record, the undersigned nonetheless asked Petitioner if there were any additional documents that he wished to offer and Petitioner indicated there was not.

[2] This matter settled via Compromise and Release on August 22, 2019 without a final determination as to many issues including injury arising out of an in the course of employment as the parties decided to forgo litigation.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

DATE: 3/1/2022

Simon Hovakimian
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

SERIOUS AND WILLFUL CLAIM

The applicant alleges serious and willful misconduct by the employer under Labor Code §4553 which states the following:

> 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.

Although the Labor Code does not give a definition for "serious and willful misconduct," the Supreme Court has defined it as the following:

> 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, willful 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 . . ." See *Mercer-Fraser Co. v. IAC (Soden)* (1953) 18 CCC 3, 11-13.

Therefore, in order to prevail on a serious and willful claim, the burden of proof falls on the applicant who must show that the employer: (1) knows of the dangerous condition; (2) knows that the probable consequence of its continuance will involve serious injury to the employee; and (3) deliberately fails to take corrective action. *Johns-Manville Sales Corp. v. WCAB (Horenberger)* (1979) 44 CCC 878, 883. Each element will be discussed separately but the applicant must show the employer affirmatively and deliberately put the applicant into harm's way.

In the case at hand, the facts are relatively straightforward. The applicant worked as a chandelier maker for the employer and during his tenure, he was assigned to fabricate a chandelier that consisted of several metal cylinders that had holes punched through them (exhibit 3, page 5-6). While he was making these chandeliers, he claims he was exposed to several chemicals and working conditions that his manager "Octavio" were aware of and the applicant was not offered respiratory protection. In his petition (exhibit A), the applicant alleges that these working

conditions in conjunction with the employer's OSHA violations (exhibit 2) is the basis for the employer's serious and willful conduct.

EMPLOYER KNOWS OF THE DANGEROUS CONDITION

The applicant must show that the employer knows of the dangerous condition. Based on the deposition of the applicant and Amended Petition for Serious and Willful, the undersigned can ascertain that the lack of respiratory protection and working in a tight space with chemicals is the serious and willful conduct of the employer. To establish this, the applicant relies heavily on the OSHA violations (exhibit 2). A review of these violations show that they all predate the applicant's employment by approximately six years. Next, the OSHA violations relate to a paint booth without a permit, equipment that is not guarded, electrical panels that were improperly exposed, uncharged fire extinguishers, uncertified forklifts operators, and other non-respiratory violations (exhibit 2, page 1). None of these conditions pertain to or add to the injury alleged by the applicant in the Petition for Serious Willful. Simply put, none of these violations are connected to applicant's cause of action of improper respiratory protection. In addition to the OSHA violations, the applicant states he told "Octavio" of the working condition and no action was taken. However, the applicant stated that he would have weekly meetings with the owner of the company, Jason Cooper regarding the fabrication of the chandeliers; but the applicant did not tell Mr. Cooper about his concerns for respiratory protection. To rebut the applicant's deposition testimony, the defendant filed the employers Injury and Illness Prevention Program that for each of the applicant's pay periods (exhibit B). This exhibit shows that the applicant signed that he had not witnessed any injuries, accidents, or workplace hazards. This appears to contradict the applicant's claim of a dangerous workplace condition. Therefore, if the applicant believed the lack of respiratory protection was an issue, he could have spoken up at any point during his employment to the owner of the company or when he signed for his paycheck Therefore, the applicant failed at meeting the burden of proving that there was a dangerous condition.

EMPLOYER KNOWS THAT THE PROBABLE CONSEQUENCE OF ITS CONTINUED ACTION WILL INVOLVE SERIOUS INJURY TO THE EMPLOYEE

As it was found that the applicant did not prove the employer knew of a dangerous condition, the employer cannot know the consequences of its continued action will cause serious injury to the applicant.

EMPLOYER DELIBERATELY FAILS TO TAKE CORRECTIVE ACTION

The applicant must prove that the employer deliberately fails to take corrective action. In the event the first two elements are met, the applicant fails to establish that the employer deliberately failed to take corrective action. As stated above, the applicant had multiple opportunities to tell the owner of the company of the issues he was having while fabricating the chandlers but did not. Therefore, the employer cannot deliberately fail to take corrective action when it does not know what corrective action needs to be made.

Based on the applicant’s deposition, Petition for Serious and Willful Conduct, and all the exhibits, it is found that the applicant did not meet the burden of proof to establish the elements of a serious and willful claim.

DATE: 2/3/2022

Simon Hovakimian
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE