WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICHARD WILLIAMS, *Applicant*

vs.

PACE SUPPLY CORPORATION; ZURICH AMERICAN INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Number: ADJ10791329
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in order to study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

We have considered the allegations of the Petition for Reconsideration and the Answer 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 Opinion on Decision and Report, both of which we adopt and incorporate, we will affirm the Findings, Award and Order.

[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated September 13, 2021. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Order by the workers' compensation administrative law judge on June 21, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 23, 2022

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

RICHARD WILLIAMS
APPEL LAW FIRM LLP
LAUGHLIN, FALBO, LEVY & MORESI
MULLEN & FILIPPI

AS/ara

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

OPINION ON DECISION

Background

1. Testimony of Applicant

On direct examination, applicant testified that typical day now includes having to shower early to try to loosen up his back and neck and help manage his pain. He sleeps in two rooms. His bedroom has an adjustable bed, and he has a chair in a different bedroom, so as not to disturb his wife. He also has a chair next to his bed to help him get going in the morning before he tries to walk. He also has a chair in the bathroom while he does such activities as brushing his teeth. He can only stand for three to five minutes due to pain.

He uses a cane to help him walk at all times, but he can use furniture or a countertop to help him move through the house. He uses a chair in the kitchen, as needed, while performing activities in the kitchen. He puts his foot in ice buckets once a day. He does home exercises recommended by the physical therapist. He can only raise his arm partially and not over his head. He also puts a heating pad on his shoulder and lower back, and ice on his knees.

He will also then elevate his feet and knees, which requires him to use a recliner. He uses a handheld massage gun on his lower legs, upper and low back, and right shoulder. He will also sometimes take another shower to loosen up his back and right shoulder.

His pain medication makes him drowsy and makes concentration on tasks difficult. He needs to elevate his ankles several times per day. In the evening, after his wife gets home, he tries to spend as much time with her as he can, and he then will go upstairs to his bedroom by 8:00 to 9:00 p.m., and elevates legs, puts ice back on his back, and the massage gun on his legs. At night, he will start in recliner, and then sleep for one to two hours at a time, for a total of three to five hours per night. He will then sometimes move to his bed.

Most of his day is spent managing his pain. There has not been a day since the injury where he has not been in pain. His neck pain is between five and eight, and he experiences it daily. His lower back pain is from seven to ten and is more constant. His right shoulder pain is between five and eight and can last 20-30 minutes at a time. His knee pain is between a five and nine. His ankle pain is between a seven to ten. He has to prepare to bear weight on it. He has floating nerve pain there, and the high level of pain can last 30-45 minutes. His foot pain is similar.

Before his injury at age 59, he had been in the work force since age 21. He enjoyed working. He can't work now because of what he needs to do on a daily basis for pain, as well as the effects of pain medication, which causes him to be drowsy on a daily basis and causes concentration problems. He could not commit to being able to do a job for any length of time during a regular day. His schedule is also unpredictable because of the pain, and his sleep pattern does not allow him to regularly wake up at the same time. He wouldn't expect to be able to be hired with his unpredictable pain level throughout the day.

He takes pain medications: Gabapentin (600 mg times three times per day) baclofen (10 mg two times a day), and Norco (10/325, = one pill three times per day).

On the date of injury, he was working at Pace Supply. It happened at 6:30 a.m., and it was still dark at night. He was walking from his car on an asphalt surface. He was struck from behind by a forklift driven by Mr. Robles.

On Cross-examination by Zurich, he stated that the massage gun is not prescribed, and he uses it when he feels the need to do so. He has not elevated his feet since beginning testimony, as he is sitting up, and can't do so while sitting in a non-reclining chair. He used the massage gun during the break, as well as using a heating pad on his lower back. It's not typical that he would sit for more than one hour and 15 minutes without using the massage gun. He took a shower just before starting with his testimony, and his pain level now is "challenging" due to being unable to elevate his feet. He got up after testifying for 30-45 minutes, but he usually can only sit 15-20 minutes at a time in a non-reclining chair.

Dr. Malavaram mentioned low back and neck medial branch blocks in December of 2020, and 50 percent relief of pain. This lasted for six to eight days. Since then, he had a neck and low back ablation. These have helped his pain, but he's not sure how long it will last.

Since he saw Rachel Feinberg in November of 2020, he is not feeling better overall. Applicant is waiting until the COVID situation improves before he undergoes the surgery. He had his first COVID vaccine, and he will get his second dose on April 13, 2021.

Before his injury, he had lower back pain. He had seen Dr. Shinaman going back to 2009. He had an injection to his lower back. He would use a shoe insert, prescribed by Dr. Shea, that he would use before the date of injury. He had a right knee surgery in 2015.

On cross-examination by Pace Supply Company, Mr. Williams stated that on the morning of the injury, he doesn't remember if it was cold then. There was no reason that he would have been moving faster or slower. He was not checking emails on his phone as he walked to the office. The distance from his car to the door he was walking was approximately 100 feet. He didn't park in the same spot every day. On a typical day, it would take just a few minutes to get from his car to the office.

The forklift struck him from behind. The back of his left ankle was struck first. He was about halfway to the building when he was struck. He was walking in a straight line. He did not hear the forklift before it struck him, and he did see lights on the forklift. (*Applicant got up to adjust the heating pad at 11:01 a.m.*). He doesn't recall walking in front of the forklift. He saw the forklift when it was a ways from him, about 40-50 feet away, but didn't see it getting any closer to him. There were no other cars coming into the parking lot. There were no exterior lights, that he can recall, in the parking lot.

It was dark at the time of injury, but he doesn't remember if it was pitch black. He doesn't recall that it was so dark that he couldn't see the building. On previous mornings where it was dark, he doesn't recall having problems seeing in that area. There was nothing obstructing his path from the

parking lot to the door of the building. He doesn't recall if it had rained that morning. (Applicant stood up and changed positions at 11:08. He also used the massage gun during the morning.)

On re-direct examination, applicant testified that he was interviewed by vocational experts and he told the truth to each of them. (*Minutes of Hearing and Summary of Evidence (MOH/SOE)* at pp. 6-10.)

2. Testimony of Apolinar Robles, Jr.

Mr. Robles was called as an adverse witness under Evidence Code section 776 by Applicant's counsel, and testified on examination by applicant's attorney that he was operating the forklift that struck Applicant. He was traveling forward with a water heater encased in wood. It was fairly dark at 6:30 a.m.

The day before the incident, he noticed that the rear light was not operational. This helps him if he has to drag a load while operating the forklift. He generally would drive forward, except when there was a visual obstruction, so that he would drive in reverse and drag the load behind him as he backs up. The reverse light would illuminate his reverse travel. He would report a broken light, and he reported it to Rudy Love, the warehouse manager at that location for Pace Supply Co. The reverse light was not working when the injury occurred. If the reverse light was working then, he could have driven backward and dragged the load behind him. This was the standard mode of operation, but he could not do so because of the broken reverse light.

His view was somewhat obstructed, and he would move his head left and right to be able to see. He is not sure which part of forklift struck Applicant. He did not see Applicant before he struck Applicant.

The forklift requires a key. It was not "red tagged," and the keys has not been removed or locked up. The keys are regularly left on the forklift, and he does not recall being told by Mr. Love not to use the forklift. If told not to use the forklift, he would not have used it. This was a two to three ton forklift, and the load was an additional 500 pounds.

ON dross-examination by Pace Supply Company, Mr. Robles stated that he was interviewed and told the truth and provided all information asked to the OSHA inspector. He also told the truth at the time of his deposition in June of 2018.

He had a checklist that he followed to inspect the forklift every day. That is now done by someone else. The forklift had two lights in the front and three overall. He honked the horn a few times before the accident. He had seen other employees in the parking lot while he was driving it. 90 percent of the time, he would drive the forklift while it was daylight.

On the day before the injury, after he informed Mr. Love of the broken light, he continued to use it because it was daylight. He was driving the forklift in a straight path with the parking lot on his right and truck on his left. He didn't see Applicant before he hit him. He was disciplined and had to re-certify as a forklift operator. On cross-examination by Zurich he stated that his work shift started at about 5:00 a.m. (*MOH/SOE, supra,* at pp. 10-11.)

3. Testimony of Rudolph Love

Mr. Love was called as an adverse witness under Evidence Code section 776 by Applicant's counsel, and testified on examination by applicant's attorney that he was the warehouse manager at Pace Supply of 425 Market Street in Oakland. On the day before the injury, he does not recall being told that the reverse light was inoperable.

He was read his deposition. Not using the reverse light could be a safety issue, and he would regularly submit a request to get the light fixed. He sent an email to Campiotti Lift Truck Service to fix the forklift due to codes and to fix the light. This is mentioned in Exhibit 2 to his deposition (Exhibit 107.) They emailed him back about two hours after the incident.

Mr. Love did not take the keys out of the forklift or "red tag" it to take it out of service. He chose to keep it in service despite the missing taillight. He doesn't know the specifics of the OSHA citations. He had the power to remove the forklift to remove the forklift from service. He can't say that he knew he had a duty to remove it before. He didn't take it out of service because it was most often used in daylight, but he admitted that Mr. Robles started his shift at 5:00 am.

On cross-examination by Pace Supply Company, Mr. Love stated that he was warehouse manager at time of injury for one to two years. Previously, he was a forklift operator. He reports to Marty Outlaw, the branch manager. He would report to safety manager, Colin Folk, when necessary. He would help schedule safety meetings, but the topic was run by Mr. Folk. He would suggest some topics if he saw a safety issue. He hadn't disciplined anyone before this incident.

He recalls his deposition from 2018, and his recollection was better then.

Red tagging was generally done by maintenance, which takes a forklift out of operation. He had seen that at least once before the accident. This was usually done when the forklift was non-operational. He agrees that at least 90 percent of the forklift operation was in a well-lit area, up to 98 percent of the time.

He had never driven a forklift in the dark when lights were not working.

He started work on the day of the accident at about 5:30 a.m., after Mr. Robles started. There were two others that started at 5:00 a.m. On the date of the injury, just he and Mr. Robles were operating a forklift. He was walking into the office when the accident happened.

He doesn't know how long it would take to repair a forklift. The repairs would usually happen on the same day or the next day from when the service was requested.

The forklift was being driven in a straight line with no designated walkway in the area. There were monthly meetings. There is now more lighting, signs, and a walkway now exist in the area. There was some floodlights in the parking lot at the time of the incident at the front of the warehouse and on top of the building. They were all working as far as he recalls.

He testified in his deposition that he generally does not tell forklift operators exactly when to use the forklift. The orders are assigned at the beginning of the day. Forklift inspections are done by operators at the beginning of the day, and they are also done during the day. If inoperable, the forklift would be taken out of service, but they could be used for the rest of the day, if operable. He would only inspect a forklift if he was the one operating it. (*MOH/SOE, supra,* at pp. 11-13.)

4. Testimony of Gerald Fulgham

On direct examination by applicant's counsel, Mr. Fulgham testified that he has an associate degree in applied engineering and has been a safety engineer since 1977. He worked on the Park River Project as a safety engineer. He has worked in a power plant and was a project safety engineer for Dillinghman Construction. He worked for Cal OSHA for over three years, and then returned to Dillingham International in Puerto Rico. In 1989, he associate safety engineer for Cal OSHA. He was senior engineer until he retired in 2001. He has been a consultant in the field since 2001.

He was involved in drafting Cal OSHA regulation. He has been retained by Applicant's Attorney in this matter, and he has reviewed materials such as the S&E applications, the Cal OSHA report, a trial brief, and depositions of Mr. Robles, Mr. Folk, Mr. Love, and Applicant.

The injury was at 6:30 a.m., and the sun rose on that day at 6:49 a.m. The orientation of the accident area was such that it was still dark then. The forklift weighed 8,875 pounds.

His understanding of how the incident occurred is that there was a report of a broken taillight provided to Mr. Love the day before the injury, but the forklift was not repaired before the accident. Because of the lack of a rear light, Mr. Robles had to drive forward with the load in front of him and obstructing him. His primary opinion is that the forklift operated with a defect that required, per CCR section 3650(t))7), that it be taken out of service. He read this code section into the record.

The forklift was defective because of the obstructed view due to the need to drive forward because of the lack of a working taillight. This section requires it to be taken out of service, and Mr. Love deliberately violated this section. It wasn't until one hour and 45 minutes after the incident that the repair vendor contacted Pace about the repair.

Regarding Mr. Folk's deposition testimony about Mr. Love as a manager, he was the one responsible to take the forklift out of service and prevent its use until it was repaired. The language is mandatory and not optional.

He also opines that forklifts have an industry standard that comports to the language of CCR section 3560(t)(7), which is not permissive. Mr. Love and Mr. Robles were trained forklift operators, and should have known of this requirement and they testified that they knew of this. They also had the same training about trialing a load and pedestrian training. Records are also to be maintained, and they didn't do this.

Labor Code section 4560 requires a safe place to work, and Pace was not a safe place to work due to the forklift issue and pedestrian traffic. This ongoing operation was very dangerous because of how heavy forklifts are and the severity of injuries from forklifts.

On cross-examination by counsel for Pace Supply Company, Mr. Fulgham stated that he became involved in this case over a year ago, and was likely involved long ago in January of 2018. His practice is not to interview witnesses, and he didn't in this case, either.

Regarding the OSHA investigation, he believes the OSHA investigator should have been charged with a serious and willful violation. The charges were "Serious Accident Violation." The remedial actions were appropriate, but they should have been in place before the injury. These requirements were in existence for over 20 years.

Applicant was struck from the rear and partly from the side. He determined this information from depositions and evidence that he reviewed. (*MOH/SOE. supra,* at pp.13-15.)

5. Testimony of Colin Folk

On direct examination by counsel for Pace Supply Company, Mr. Folk testified that he has been the director of talent management since March of 2020. Before that, he was the director of training and safety manager for three years. He travels to various branches regularly, with 20 or so in California. He was based in Rohnert Park and visited Oakland often - once a month, on average. He provided a safety newsletter and most of the training was computer related. He would be in safety meetings, on occasion. Oakland was compliant in its completion of safety meetings.

He interpreted government regulations, before working for Pace, as a counter intelligent agent for US Army regarding national security and terrorism/espionage. He was also certified many years ago as a forklift operator. After coming to Pace, he was involved as safety manager. If he saw something unsafe, he would put things in motion to correct them.

He did an internal investigation after the incident, and responded to the Cal OSHA investigations. He interviewed acting branch manager, Mr. Robles. The OSHA investigation was accurate based upon his investigation. He spoke of "red tagging" in his 2020 deposition. This is a system that is used at Pace. It was used for severed seat belts, cracked forks, frame damage, and mechanical issues, such as profuse leakage. Over 90 percent of usage of forklifts at Pace was during daylight hours. Outside yards are also lit.

Mr. Robles received a written reprimand for driving a forklift unsafely, and he had to recertify for forklift operation. He was critical of Mr. Robles' actions, and everyone could have handled the issue better. The forklift checklists are now done daily. There is also a crosswalk in the lot and additional lights in the parking lot. There were no faulty outside lights at the time, to his knowledge. At the time of the incident, Applicant moved perpendicular to get in front of the forklift.

He met with the Cal OHSA investigator more than once, and had communication via letters, phone calls, and a wrap-up conference at the end of the process. Citations were reduced from $47,000 to about $18,000.

On cross-examination by applicant's attorney, Mr. Folk stated that he was safety manager for only one month prior to the injury, and he hadn't undergone safety training in that month. He has not enforced any Cal OSHA violations, any Cal OSHA training, or any safety training regarding forklifts.

The lack of a rear taillight was a causal factor in the injury. The light would have provided illumination for Mr. Robles to drive backward and drag the load, which would have allowed him to see Applicant. Driving backwards when a load is obstructing the front is company policy.

Mr. Love was the managing agent for the warehouse, and he is aware that Mr. Love was advised of the defective light.

Mr. Love wrote an email at about 4:30 the day before the injury. Mr. Love was then required to make sure the forklift wasn't used until the light was repaired. It was his job to make sure it wasn't operated in an unsafe manner in the dark.

He agreed that Pace violated section 3560(t)(7). The duty to take it out of service was Mr. Love's responsibility. The likeliness of the injury would have been reduced if Mr. Robles had driven in reverse, and the tines could not have struck Applicant if Mr. Robles was driving in reverse.

On re-direct examination, Mr. Folk testified that there were two to three forklifts in operation at Pace on the date of injury. He doesn't know if the other forklifts were in operation at the time of the incident. (*MOH/SOE. supra,* at pp. 15-17.)

DISCUSSION

Permanent Disability

Applicant was evaluated by Dr. Peter Mandell as the orthopedic Agreed Medical Examiner (AME). In his numerous reports from February 1, 2019 through November 22, 2020 (Exh's 101-105) and his September 23, 2020 deposition (Exh 106), Dr. Mandell provided impairment to numerous body parts. For the right shoulder, he found 25% whole person impairment (WPI) with no apportionment. For the feet/ankles/lower extremities, Dr. Mandell found 26% WPI on the right side and 27% WPI on the left side with apportionment of 10% to his obesity and flat feet, which preexisted the injury. For the neck, Dr. Mandell found 8% WPI with 10% apportionment to obesity. For the low back, Dr. Mandell provided 8% WPI with 15% apportionment to obesity and prior low back problems. For the right knee, Dr. Mandell found 8% WPI with 10% apportionment to his obesity and flat feet. Lastly, Dr. Mandell opined that applicant has 8% WPI for the left knee, with 15% apportionment due to his obesity, flat feet and his 2015 ACL repair. This rates out as follows:

R shoulder: 16.02.02.00 – 25% [1.4] – 35% - 212F – 35 – 42%
R lower extremity: .90 (17.07.06.00 – 26% [1.4] – 36% - 212E – 33 – 40%) 36%
L lower extremity: .90 (17.07.06.00 – 27% [1.4] – 38% - 212E – 35 – 42%) 38%
C-spine: .90 (15.01.01.00 – 8% [1.4] – 11% - 212E – 10 – 13%) 12%
L-spine: .85 (15.03.01.00 – 8% [1.4] -11% - 212E – 10 – 13%) 11%
L knee: .90 (17.05.04.00 – 8% [1.4] – 11% - 212E – 10 – 13%) 12%
R knee: .85 (17.05.04.00 – 8% [1.4] – 11% - 212E – 10 – 13%) 11%
CVC = 86%

Dr. Mandell's report supports the need for further medical treatment to each of these body parts.

With respect to applicant's work restrictions, Dr. Mandell stated at page 11 of his August 20, 2020 report (Exh. 104) that "he basically can't do any kind of work because he's in so much pain and discomfort in an unpredictable fashion so much of the time." In his deposition, Dr. Mandell noted that even a sedentary job would be too much for him (p. 14). At p. 16, Dr. Mandell testified that applicant has to take strong narcotics, "so that would interfere with his mentation probably." At p. 17, Dr. Mandell opined that the most he could work would be one to two hours per day, four to five days per week, with breaks every 10-15 minutes for 20-30 minutes before resuming work activity. In his last report of November 22, 2020 (Exh. 105), Dr. Mandell stated at pages 2 -3 that he adopts the results of the Rachel Feinberg's November 12, 2020 Functional Capacity Evaluation (Exh. 110) and that he does not see how applicant can compete in the open labor market.

Vocationally, applicant was evaluated by Scott Simon for defendant and by Eugene Van de Bittner for applicant. Mr. Simon finds in his December 7, 2020 report (Exh. A) that applicant is amenable to rehabilitation, and that he has a Diminished Future Earnings Capacity (DFEC) of only 75%, despite his 86% level of permanent disability per the AME. Applicant's expert, Mr. Van de Bittner, finds in his reports of October 5, 2020 (Exh. 1) and December 17, 2020 (Exh. 2) that applicant is not amenable to rehabilitation, and that he is not employable. Mr. Van de Bittner also notes that a vocational apportionment analysis results in 100% of applicant's unemployability and DFEC attributable solely to industrial factors.

Although the statutory scheme of rating permanent disability pursuant to the 2005 Permanent Disability Rating Schedule (PDRS) is presumptively correct, it can be rebutted, as determined in *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal. App. 4th 1262 [76 Cal.Comp.Cases 624], which states:

> [A]n employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of *future earning capacity* than reflected in the scheduled rating (emphasis added). (*Ogilvie, supra* 197 Cal. App. 4th at p. 1277.)

The *Ogilvie* court derived the method of rebutting the PDRS by demonstrating that due to industrial injury the employee is not amenable to rehabilitation from the California Supreme Courts's opinion in *LeBoeuf v. Workers' Compensation Appeals Board* (1983) 34 Cal.3d 234. This has been referred to as the "LeBoeuf method." The *Ogilvie* case clarified that the LeBoeuf method is only applicable in cases "where the employee's diminished future earnings are directly attributable to the employee's work-related injury, and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education." (*Ogilvie, supra*, 197 Cal.App.4th at p. 1275.) "This application of *LeBoeuf* hews most closely to an employer's responsibility . . . to 'compensate only for such disability or need for treatment as is occupationally related.'" (*Id*. at p. 1275.)

Turning to the instant case, I find that the 100% permanent disability opinion of Mr. Van de Bittner supports applicant's claim of permanent total disability. His opinion is better reasoned, in that it best takes into account applicant's extreme work limitations and extensive permanent disability as set forth by Dr. Mandell in his reports and deposition. Mr. Van de Bittner's opinion is also much more consistent with applicant's permanent disability rating of 86%. The opinion of Mr. Simon contains a significant inaccuracy in that he states at Finding number 2 at page 28 of his report that applicant is capable of sedentary part-time work pursuant to the opinion of Dr. Mandell. This is incorrect. Dr. Mandell stated in his original report of February 1, 2019 that applicant could probably return to a sedentary position, but this was before all of applicant's reached permanent and stationary status. In his later reports and his deposition, Dr. Mandell repeatedly stated that applicant could not realistically return to the workforce. Therefore, I find that applicant's level of permanent disability is 100%, without apportionment per the opinion of Mr. Van de Bittner.

Moreover, applicant's unrebutted and credible testimony is consistent with the vocational and medical evidence. His presentation was sincere, and he appeared to be in discomfort, as well as needing to change positions frequently while testifying.

Admissibility of and Reimbursement for the Reporting of Mr. Van de Bittner

Defendant contends that the report of Mr. Van de Bittner is not admissible, but case law is replete the admissibility of vocational expert reports for injuries after January 1, 2013. Accordingly, applicant's counsel is entitled to reimbursement for Mr. Van de Bittner's reports from Zurich, in an amount to be adjusted by the parties, with jurisdiction reserved.

Serious and Willful Misconduct of the Employer – Labor Code section 4553

Multiple witnesses testified regarding the allegation of serious and willful misconduct (S&W) of the employer, as alleged pursuant to Labor Code section 4453. All of the witness testimony, as well as that of applicant, supports a finding of serious and willful misconduct by the employer.

"An award for serious and wilful [*sic*] misconduct is 'of the nature of a penalty.' Such an award can be sustained only if the evidence establishes and the [WCAB] finds every fact essential to its imposition." (*Dowden v. Industrial. Acc. Com.* 223 Cal.App.2d 124 at p. 129 [28 Cal.Comp.Cases 261], quoting *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d 102, 108 [18 Cal.Comp.Cases 3] (*Mercer-Fraser*).) "A claim of serious and wilful [*sic*] misconduct raises issues

of law as well as of fact. Issues relating to the credibility of witnesses, the persuasiveness or weight of evidence, and the resolution of conflicting inferences are questions of fact. 'But as to what minimum factual elements must be proven in order to constitute serious and wilful [*sic*] misconduct, and the sufficiency of the evidence to that end, the questions are of law.'" (*Dowden, supra,* 28 Cal.Comp.Cases at p. 264, quoting *Mercer-Fraser, supra*, 18 Cal.Comp.Cases at p. 10.)

"The term 'serious and wilful [*sic*] 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'." (Emphasis in original.) (*Mercer-Fraser, supra*, 18 Cal.Comp.Cases at p. 11.) A finding that an employer is guilty of serious and willful misconduct in failing to act for employee safety must "be based on evidence that [the employer] deliberately failed to act for the safety of [its] employees, knowing that [its] failure would probably result in injury to them." (*Rogers Materials Co. v. Industrial Acc. Com.* (1965) 63 Cal.2d 717, 722 [30 Cal.Comp.Cases 421, 423]; *Mercer-Fraser, supra*, 18 Cal.Comp.Cases at p. 11.) Thus, in the context of an alleged failure to act for employee safety, an employer guilty of serious and willful misconduct must (1) know of the dangerous condition, (2) know that the probable consequences of its continuance will involve injury to an employee, and (3) deliberately fail to take corrective action. (*Johns-Manville Sales Corp. v. Workers' Comp. Appeals Bd. (Horenberger)* (1979) 96 Cal.App.3d 923, 933 [44 Cal.Comp.Cases 878]; *Mercer-Fraser, supra*, 18 Cal.Comp.Cases at p. 11; *Rogers Materials, supra*, 30 Cal.Comp.Cases at pp. 423-424; *Dowden, supra*, 28 Cal.Comp.Cases at p. 265.)

The injured worker has the burden of proving the elements of serious and willful misconduct by the employer before additional compensation is allowed by section 4553. (See *Dowden, supra*, 27 Cal.Comp.Cases at p. 264].) The employer's misconduct must be performed by an executive, general superintendent, general partner, managing officer or managing representative. (Lab. Code, § 4553; *Bigge Crane & Rigging Co. v. Workers' Comp. Appeals Bd. (Hood)* (2010) 188 Cal.App.4th 1330 [75 Cal.Comp.Cases 1089].)

Moreover, the employer's misconduct must be the proximate cause of applicant's injuries. "Even if we assume that failure to remedy a known slippery walking surface can qualify as serious and willful misconduct, a claimant must establish that such failure was the proximate cause of her injury." (*Horenberger, supra*, 44 Cal.Comp.Cases at 884.)

Here, the testimony of all witnesses supports that it was dark at the time of the injury, and that there was no reverse light on the forklift at the time of injury. Therefore, lights on the forklift were necessary for safety at the time of applicant's injury.

Mr. Robles, the operator of the forklift which injured applicant, testified that he would normally drive the forklift forward, except when there was a visual obstruction, in which case he would normally drive in reverse and drag the load behind him, with the reverse light to illuminate his reverse travel. On the day before the injury, he reported to broken reverse light to Rudolph Love, and he continued to use the forklift on that day because it was light. Mr. Love testified that he did not recall that he was told the reverse light was not operational, but was referred to his deposition. At pages 34-36 of his June 22, 2018 deposition (Exh. 107), he had stated that he requested a repair

order for the missing light bulb on the forklift in question, late in the afternoon on the date before the injury.

Additional significant testimony on the subject is from Colin Folk, the director of talent management for Pace Supply Company. He testified that the lack of a rear taillight was a causal factor in the injury. He also testified that the employer violated CCR section 3560(t)(7), and that the likeliness of the injury would have been reduced if Mr. Robles had driven in reverse, and the tines of the forklift could not have struck Applicant if Mr. Robles was driving in reverse.

Further evidence in support of the S&W violation is found in the Cal OSHA Inspection Report of May 22, 2017 (Exh. 6), wherein two serious violations were found pursuant to CCR sections 3650(t)(7) and (11). These were found in relation to the inoperative reverse light on the forklift, and failure to operate the forklift in reverse when carrying a load that obstructed his forward view. The dollar amount of the OSHA violations was later reduced from $47,000.00 to $18,000.00, and the violation regarding failure to travel in reverse was withdrawn. The violation regarding the inoperative reverse light remained in effect.

With respect to the elements necessary to establish the S&W violation, the testimony of Mr. Robles, Mr. Love and Mr. Folk demonstrate that the employer knew of the dangerous condition before the injury. Secondly, it is reasonable that the probable consequences of operating the forklift with the broken taillight would lead to injury of one of its employees, as testified to most specifically by Mr. Folk. Lastly, the employer deliberately did not take the necessary corrective action of taking the forklift out of operation once Mr. Love became aware of the broken light. There was a good deal of testimony that the forklift was used primarily in daylight, but I find said testimony irrelevant to this S& W analysis. Accordingly, I find that the injury was proximately caused by the serious and willful misconduct of the employer pursuant to Labor Code section 4553, resulting in a 50% increase in compensation recoverable in this matter, and up to $250.00 in costs and expenses, less an attorney's fee of 15% of such increase.

Applicant's Attorney's Fee

Applicant's attorney has performed valuable services on behalf of applicant, and is entitled to a fee of 15% of the permanent disability indemnity awarded herein, as well as 15% of the increased compensation awarded under Labor Code section 4553.

Dated: June 18, 2021

JAMES GRIFFIN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

REPORT AND RECOMMENDATION
ON PETITION FOR
RECONSIDERATION

INTRODUCTION

By a timely and verified Petition for Reconsideration (Petition), defendant employer, Pace Supply Corporation, seeks reconsideration of my June 21, 2021 Findings, Award and Order, wherein I found, among other things, that applicant, while employed on February 23, 2017, as a project manager (Occupational Group No. 212) at 425 Market Street in Oakland, California, by Pace Supply Corporation, sustained injury arising out of and in the course of employment to his neck, low back, right shoulder, bilateral knees, bilateral ankles, and bilateral feet, and that applicant's injury was caused by the serious and willful misconduct of the employer pursuant to Labor Code section 4553, resulting in a 50% increase in compensation recoverable in this matter, and up to $250.00 in costs and expenses, less an attorney's fee of 15% of such increase.

Defendant employer contends: (1) there was not probable cause that the broken taillight would result in injury; (2) the employer did not deliberately failed to take corrective action when notified of the broken taillight on the forklift which caused the injury; and (3) the employer was justified in relying on Mr. Robles, the forklift driver, which does not rise to the level of serious and willful misconduct. The carrier, which is responsible for benefits not related to the Labor Code section 4553 finding, did not file a separate Petition for Reconsideration. Applicant filed an answer, disputing the employer's contentions. I have reviewed the entire record in this matter, the employer's Petition, and applicant's Answer. Based upon my review, I recommend that the employer's Petition be denied.

FACTUAL BACKGROUND

This relevant factual background related to the Labor Code section 4553 finding is set forth as follows at pages 3-11 of my Opinion on Decision as follows:

> [On direct testimony, applicant testified that] on the date of injury, he was working at Pace Supply. It happened at 6:30 a.m., and it was still dark. He was walking from his car on an asphalt surface. He was struck from behind by a forklift driven by Mr. Robles.
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> * * *
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> On cross-examination by Pace Supply Company, Mr. Williams stated that on the morning of the injury, he doesn't remember if it was cold then. There was no reason that he would have been moving faster or slower. He was not checking emails on his phone as he walked to the office. The distance from his car to the door he was walking was approximately 100 feet. He didn't park in the same spot every day. On a typical day, it would take just a few minutes to get from his car to the office.

The forklift struck him from behind. The back of his left ankle was struck first. He was about halfway to the building when he was struck. He was walking in a straight line. He did not hear the forklift before it struck him, and he did see lights on the forklift. He doesn't recall walking in front of the forklift. He saw the forklift when it was a ways from him, about 40-50 feet away, but didn't see it getting any closer to him. There were no other cars coming into the parking lot. There were no exterior lights, that he can recall, in the parking lot.

It was dark at the time of injury, but he doesn't remember if it was pitch black. He doesn't recall that it was so dark that he couldn't see the building. On previous mornings where it was dark, he doesn't recall having problems seeing in that area. There was nothing obstructing his path from the parking lot to the door of the building. He doesn't recall if it had rained that morning. (Applicant stood up and changed positions at 11:08. He also used the massage gun during the morning.)

* * *

1. Testimony of Apolinar Robles, Jr.

Mr. Robles was called as an adverse witness under Evidence Code section 776 by Applicant's counsel, and testified on examination by applicant's attorney that he was operating the forklift that struck Applicant. He was traveling forward with a water heater encased in wood. It was fairly dark at 6:30 a.m.

The day before the incident, he noticed that the rear light was not operational. This helps him if he has to drag a load while operating the forklift. He generally would drive forward, except when there was a visual obstruction, so that he would drive in reverse and drag the load behind him as he backs up. The reverse light would illuminate his reverse travel. He would report a broken light, and he reported it to Rudy Love, the warehouse manager at that location for Pace Supply Co. The reverse light was not working when the injury occurred. If the reverse light was working then, he could have driven backward and dragged the load behind him. This was the standard mode of operation, but he could not do so because of the broken reverse light.

His view was somewhat obstructed, and he would move his head left and right to be able to see. He is not sure which part of forklift struck Applicant. He did not see Applicant before he struck Applicant.

The forklift requires a key. It was not "red tagged," and the keys has not been removed or locked up. The keys are regularly left on the forklift, and he does not recall being told by Mr. Love not to use the forklift. If told not to use the forklift, he would not have used it. This was a two to three ton forklift, and the load was an additional 500 pounds.

On cross-examination by Pace Supply Company, Mr. Robles stated that he was interviewed and told the truth and provided all information asked to the OSHA inspector. He also told the truth at the time of his deposition in June of 2018.

He had a checklist that he followed to inspect the forklift every day. That is now done by someone else. The forklift had two lights in the front and three overall. He honked the horn a few times before the accident. He had seen other employees in the parking lot while he was driving it. 90 percent of the time, he would drive the forklift while it was daylight.

On the day before the injury, after he informed Mr. Love of the broken light, he continued to use it because it was daylight. He was driving the forklift in a straight path with the parking lot on his right and truck on his left. He didn't see Applicant before he hit him. He was disciplined and had to re-certify as a forklift operator. On cross-examination by Zurich he stated that his work shift started at about 5:00 a.m. (*MOH/SOE, supra*, at pp. 10-11.)

2. Testimony of Rudolph Love

Mr. Love was called as an adverse witness under Evidence Code section 776 by Applicant's counsel, and testified on examination by applicant's attorney that he was the warehouse manager at Pace Supply of 425 Market Street in Oakland. On the day before the injury, he does not recall being told that the reverse light was inoperable.

He was read his deposition. Not using the reverse light could be a safety issue, and he would regularly submit a request to get the light fixed. He sent an email to Campiotti Lift Truck Service to fix the forklift due to codes and to fix the light. This is mentioned in Exhibit 2 to his deposition (Exhibit 107.) They emailed him back about two hours after the incident.

Mr. Love did not take the keys out of the forklift or "red tag" it to take it out of service. He chose to keep it in service despite the missing taillight. He doesn't know the specifics of the OSHA citations. He had the power to remove the forklift to remove the forklift from service. He can't say that he knew he had a duty to remove it before. He didn't take it out of service because it was most often used in daylight, but he admitted that Mr. Robles started his shift at 5:00 am.

On cross-examination by Pace Supply Company, Mr. Love stated that he was warehouse manager at time of injury for one to two years. Previously, he was a forklift operator. He reports to Marty Outlaw, the branch manager. He would report to safety manager, Colin Folk, when necessary. He would help schedule safety meetings, but the topic was run by Mr. Folk. He would suggest some topics if he saw a safety issue. He hadn't disciplined anyone before this incident.

He recalls his deposition from 2018, and his recollection was better then.

Red tagging was generally done by maintenance, which takes a forklift out of operation. He had seen that at least once before the accident. This was usually done when the forklift was non-operational. He agrees that at least 90 percent of the forklift operation was in a well-lit area, up to 98 percent of the time.

He had never driven a forklift in the dark when lights were not working.

He started work on the day of the accident at about 5:30 a.m., after Mr. Robles started. There were two others that started at 5:00 a.m. On the date of the injury, just he and Mr. Robles were operating a forklift. He was walking into the office when the accident happened.

He doesn't know how long it would take to repair a forklift. The repairs would usually happen on the same day or the next day from when the service was requested.

The forklift was being driven in a straight line with no designated walkway in the area. There were monthly meetings. There is now more lighting, signs, and a walkway now exist in the area. There was some floodlights in the parking lot at the time of the incident at the front of the warehouse and on top of the building. They were all working as far as he recalls.

He testified in his deposition that he generally does not tell forklift operators exactly when to use the forklift. The orders are assigned at the beginning of the day. Forklift inspections are done by operators at the beginning of the day, and they are also done during the day. If inoperable, the forklift would be taken out of service, but they could be used for the rest of the day, if operable. He would only inspect a forklift if he was the one operating it. (*MOH/SOE, supra*, at pp. 11-13.)

3. Testimony of Gerald Fulgham

On direct examination by applicant's counsel, Mr. Fulgham testified that he has an associate degree in applied engineering and has been a safety engineer since 1977. He worked on the Park River Project as a safety engineer. He has worked in a power plant and was a project safety engineer for Dillingham Construction. He worked for Cal OSHA for over three years, and then returned to Dillingham International in Puerto Rico. In 1989, he associate safety engineer for Cal OSHA. He was senior engineer until he retired in 2001. He has been a consultant in the field since 2001.

He was involved in drafting Cal OSHA regulation. He has been retained by Applicant's Attorney in this matter, and he has reviewed materials such as the S&E applications, the Cal OSHA report, a trial brief, and depositions of Mr. Robles, Mr. Folk, Mr. Love, and Applicant.

The injury was at 6:30 a.m., and the sun rose on that day at 6:49 a.m. The orientation of the accident area was such that it was still dark then. The forklift weighed 8,875 pounds.

His understanding of how the incident occurred is that there was a report of a broken taillight provided to Mr. Love the day before the injury, but the forklift was not repaired before the accident. Because of the lack of a rear light, Mr. Robles had to drive forward with the load in front of him and obstructing him. His primary opinion is that the forklift operated with a defect that required, per CCR section 3650(t))7), that it be taken out of service. He read this code section into the record.

The forklift was defective because of the obstructed view due to the need to drive forward because of the lack of a working taillight. This section requires it to be taken out of service, and Mr. Love deliberately violated this section. It wasn't until one hour and 45 minutes after the incident that the repair vendor contacted Pace about the repair.

Regarding Mr. Folk's deposition testimony about Mr. Love as a manager, he was the one responsible to take the forklift out of service and prevent its use until it was repaired. The language is mandatory and not optional.

He also opines that forklifts have an industry standard that comports to the language of CCR section 3560(t)(7), which is not permissive. Mr. Love and Mr. Robles were trained forklift operators, and should have known of this requirement and they testified that they knew of this. They also had the same training about trialing a load and pedestrian training. Records are also to be maintained, and they didn't do this.

Labor Code section 4560 requires a safe place to work, and Pace was not a safe place to work due to the forklift issue and pedestrian traffic. This ongoing operation was very dangerous because of how heavy forklifts are and the severity of injuries from forklifts.

On cross-examination by counsel for Pace Supply Company, Mr. Fulgham stated that he became involved in this case over a year ago, and was likely involved long ago in January of 2018. His practice is not to interview witnesses, and he didn't in this case, either.

Regarding the OSHA investigation, he believes the OSHA investigator should have been charged with a serious and willful violation. The charges were "Serious Accident Violation." The remedial actions were appropriate, but they should have been in place before the injury. These requirements were in existence for over 20 years.

Applicant was struck from the rear and partly from the side. He determined this information from depositions and evidence that he reviewed. (*MOH/SOE. supra*, at pp.13-15.)

4. Testimony of Colin Folk

On direct examination by counsel for Pace Supply Company, Mr. Folk testified that he has been the director of talent management since March of 2020. Before that, he was the director of training and safety manager for three years. He travels to various branches regularly, with 20 or so in California. He was based in Rohnert Park and visited Oakland often - once a month, on average. He provided a safety newsletter and most of the training was computer related. He would be in safety meetings, on occasion. Oakland was compliant in its completion of safety meetings.

He interpreted government regulations, before working for Pace, as a counter intelligent agent for US Army regarding national security and terrorism/espionage. He was also certified many years ago as a forklift operator. After coming to Pace, he was involved as safety manager. If he saw something unsafe, he would put things in motion to correct them.

He did an internal investigation after the incident, and responded to the Cal OSHA investigations. He interviewed acting branch manager, Mr. Robles. The OSHA investigation was accurate based upon his investigation. He spoke of "red tagging" in his 2020 deposition. This is a system that is used at Pace. It was used for severed seat belts, cracked forks, frame damage, and mechanical issues, such as profuse leakage. Over 90 percent of usage of forklifts at Pace was during daylight hours. Outside yards are also lit.

Mr. Robles received a written reprimand for driving a forklift unsafely, and he had to recertify for forklift operation. He was critical of Mr. Robles' actions, and everyone could have handled the issue better. The forklift checklists are now done daily. There is also a crosswalk in the lot and additional lights in the parking lot. There were no faulty outside lights at the time, to his knowledge. At the time of the incident, Applicant moved perpendicular to get in front of the forklift.

He met with the Cal OHSA investigator more than once, and had communication via letters, phone calls, and a wrap-up conference at the end of the process. Citations were reduced from $47,000 to about $18,000.

On cross-examination by applicant’s attorney, Mr. Folk stated that he was safety manager for only one month prior to the injury, and he hadn't undergone safety training in that month. He has not enforced any Cal OSHA violations, any Cal OSHA training, or any safety training regarding forklifts.

The lack of a rear taillight was a causal factor in the injury. The light would have provided illumination for Mr. Robles to drive backward and drag the load, which would have allowed him to see Applicant. Driving backwards when a load is obstructing the front is company policy.

Mr. Love was the managing agent for the warehouse, and he is aware that Mr. Love was advised of the defective light.

Mr. Love wrote an email at about 4:30 the day before the injury. Mr. Love was then required to make sure the forklift wasn't used until the light was repaired. It was his job to make sure it wasn't operated in an unsafe manner in the dark.

He agreed that Pace violated section 3560(t)(7). The duty to take it out of service was Mr. Love's responsibility. The likeliness of the injury would have been reduced if Mr. Robles had driven in reverse, and the tines could not have struck Applicant if Mr. Robles was driving in reverse.

On re-direct examination, Mr. Folk testified that there were two to three forklifts in operation at Pace on the date of injury. He doesn't know if the other forklifts were in operation at the time of the incident. (*MOH/SOE. supra*, at pp. 15-17.)

DISCUSSION

My review of employer Pace Supply's Petition does not cause me to change my opinion. In addition to the rationale as set forth in the Opinion on Decision, I make the following observations.

The employer's contention that there was no indication that the probable consequence of the broken taillight would result in injury is not consistent with the testimony presented by the trial witnesses. Pace Supply's safety manager, Colin Folk, conceded at trial that supervisor Rudolph Love's deliberate violation of his mandatory safety responsibility (to remove the subject forklift from service until repairs were made) acted as a causal factor of the injury. Pace Supply's forklift operator, Apolinar Robles, Jr., admitted that the incident would not have happened if the forklift lights were operational.

With respect to the employer's contention that Mr. Love failed to take corrective action which would have avoided the injury from the forklift, this is contradicted by all trial witnesses in their testimony. Mr. Love, a former forklift driver himself, testified that he never drove a forklift in the dark when the lights were not working. Mr. Folk specifically testified that Pace has a system in place of "red tagging" inoperable or unsafe equipment, but that was not done with the forklift in question, despite full knowledge by Mr. Love of the broken taillight.

There was a good deal of testimony over the fact that the forklift was rarely driven in the dark, as happened here when applicant's injury occurred. The testimony on how often the forklift was driven in the dark versus in daylight is irrelevant. The employer's witnesses did not testify that the forklift was never to be driven in the dark. They were aware of the possibility that the forklift could be driven in the dark, and the fact that it was rare does not absolve the employer of liability under Labor Code section 4553.

RECOMMENDATION

Based upon the foregoing, I recommend that employer Pace Supply's Petition for Reconsideration be **DENIED**.

Dated: August 16, 2021

JAMES GRIFFIN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE