WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NICHOLAS KOBE, ***Applicant***

vs.

CITY OF LOS ANGELES, PERMISSIBLY SELF-INSURED, ADMINISTERED BY AIMS, ***Defendants***

Adjudication Numbers: ADJ10762593
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, we will deny reconsideration.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

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/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 6, 2023

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

NICHOLAS KOBE
STRAUSSNER SHERMAN
LA CITY ATTORNEY

LN/pm

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Defendant City of Los Angeles has filed a timely, verified petition for reconsideration of the November 14, 2022 Findings and Award, which found that applicant Nicholas Kobe's claim for compensation is not barred by California Labor Code §3600(a)(7), and found injury in the form of TMJ/myofascial pain arising out of and in the course of applicant's employment as a firefighter. Applicant was awarded 72 days of temporary disability and 10% permanent disability based on unrebutted medical evidence from Panel Qualified Medical Evaluator Nina Nattiv, DDS, but the petition for reconsideration takes no issue with the amount of benefits awarded, but instead argues exclusively that the initial physical aggressor defense should have barred applicant's claim. Applicant's counsel filed a timely answer to the petition, contending that the findings correctly found that applicant was not the initial physical aggressor.

II
FACTS

At trial herein, the parties submitted issues of injury arising out of and in the course of employment, temporary disability for the period from November 21, 2016 to January 31, 2017, permanent disability, apportionment, need for further medical treatment, liability for self-procured medical treatment, and attorney fees. Also presented was the threshold issue of whether the injury alleged herein arose out of an altercation in which applicant Nicholas Kobe was the initial physical aggressor, which would exclude the employer from any liability for compensation under California Labor Code §3600(a)(7).

The injury in question arose from a verbal exchange in the parking lot between firefighter Nicholas Kobe and firefighter paramedic Dreon Brown, which at some point turned into a physical altercation. Applicant was apparently upset because he had not been relieved earlier from a 25-hour shift by Mr. Brown, and so applicant went to Mr. Brown's car, offering to help unload Mr. Brown's gear but also making remarks about the time and wanting to get home to his children. Mr. Brown was not receptive to this because he himself had battled traffic for more than three hours to report to work at a station to which he was not usually assigned. It was found that Mr. Brown was the "initial physical aggressor" because he first made physical contact with applicant by placing his finger (or hand) on applicant's nose (or face), as Mr. Brown asked applicant if he was chastising him and told applicant to back off. The opinion on decision focused on the first point of physical contact because before that, any aggression was verbal, and not physical. Based on applicant's credible testimony at trial and the

lack of evidence that the injury herein arose out of an altercation in which applicant Nicholas Kobe was the initial physical aggressor, it was found that compensation for this injury is not barred by California Labor Code §3600(a)(7).

Having reached the conclusion that compensation is not barred by Labor Code §3600(a)(7), medical issues were determined consistent with the only medical-legal expert opinions in evidence, those of Panel Qualified Medical Evaluator (PQME) Nina Nattiv, M.D. Based on Dr. Nattiv's two reports and two deposition transcripts admitted as Joint 1 through 4, it was found that applicant sustained injury in the form of TMJ/myofascial pain arising out of and in the course of his employment as a firefighter, Occupational Group Number 490, at Los Angeles, California, by the City of Los Angeles, on November 21, 2016. Applicant was 40 years old at the time of injury.

Based on applicant's unrebutted and unchallenged testimony that he earned annual wages of $104,478.40 (Minutes of Hearing and Summary of Evidence dated 9/19/2022, p. 4, lines 1-3), it was found that at the time of injury, the employee's earnings were $2,003.70 per week ($104,478.40 divided by 365 and multiplied by 7, rounded to the nearest cent), warranting indemnity rates of $1,128.43 for temporary disability (the 2016 rate), which was increased to $1,335.80 (or two-thirds of $2,003.70) by operation of Labor Code §4661.5, because the temporary disability remains unpaid more than two years after the date of injury. Based on the wage finding it was found that $290.00 per week is the applicable rate for permanent disability indemnity.

Based on the opinions of PQME Dr. Nattiv after cross-examination and in her final report, it was found that the injury caused temporary disability for the period from November 21, 2016 through January 31, 2017, for which indemnity is due at the rate of $1,335.80 per week, in the total sum of $13,739.66 (which is the weekly rate divided by 7 and multiplied by 72 days), or equivalent benefits for this period under Labor Code §4850 (which provides for leave "without loss of salary"), less an attorney fee of $2,060.05 (15% of the retroactive temporary disability awarded) to be held by defendants pending an agreement or order regarding the division of attorney fees between applicant's current and former counsel.

Based on the opinions of PQME Dr. Nattiv after cross-examination and in her final report, it was found that the injury in this case caused permanent disability of 10%, without apportionment, which entitles applicant to indemnity of $8,772.50, payable as 30.25 weeks at the rate of $290.00 per week, now fully accrued, less an attorney fee of $1,315.88 (15% of $8,772.50) to be held by defendants pending an agreement or order regarding the division of attorney fees between applicant's current and former counsel. Current counsel for applicant is the firm of Straussner Sherman Lonne Treger Helquist, and former counsel of record herein include Lewis, Marenstein, Wicke, Sherwin & Lee and Invictus Law.

The 10% permanent disability was calculated by taking the 5% Whole Person Impairment found by PQME Dr. Nattiv using Table 11-7 of the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* and making adjustments as directed by Labor Code §4660.1 and the current rating schedule, as shown in the following rating string: 11.03.02.00-5-[7]490H-10-10%.

Based on the opinions of PQME Dr. Nattiv after cross-examination and in her final report, it was found that applicant will require further medical treatment to cure or relieve from the effects of this injury, and may be entitled to reimbursement for self-procured medical care, in an amount subject to proof, with the Workers' Compensation Appeals Board reserving jurisdiction in the event of any dispute.

Based on the criteria for determining attorney fees provided in Labor Code §4903 and §4906(d), and also in California Code of Regulations, tit. 8, §10844 and WCAB Policy & Procedure Manual Index No. 1.140, it was found that the reasonable value of the services of applicant's attorneys is $2,060.05, which is equal to 15% of the retroactive temporary disability awarded, payable from the award of temporary disability, plus $1,315.88, which is equal to 15% of the gross permanent disability indemnity awarded herein, payable from the now fully-accrued award of permanent disability. Attorney fees were ordered to be held by defendants pending an agreement or order regarding the division of attorney fees between applicant's current and former counsel.

Defendant City of Los Angeles has filed a timely, verified petition for reconsideration of these findings, contained in the November 14, 2022 Findings and Award. The petition for reconsideration takes no issue with the amount of temporary and permanent disability awarded, but instead argues exclusively that the initial physical aggressor defense should have barred applicant's claim. Applicant's counsel filed a timely answer to the petition, contending that the findings correctly found that applicant was not the initial physical aggressor.

III
DISCUSSION

California Labor Code § 3600(a)(7) uses the word "physical" to describe the kind of initial aggression that would bar compensation, and although the testimony of Nicholas Kobe and Dreon Brown at trial was mutually inconsistent in many respects, both witnesses, as well as the investigation reports admitted as Applicant's 1, suggest that the first adverse *physical* contact was most likely between Mr. Brown's finger (or hand) and Mr. Kobe's nose (or face), as Mr. Brown asked Mr. Kobe if he was chastising him and told Mr. Kobe to back off.

Defendant's petition for reconsideration correctly notes that there is authority to support the proposition that one need not make initial physical *contact* to be the initial physical *aggressor,* and indeed, Labor Code § 3600(a)(7) uses the word "aggressor" to bar compensation for an injury arising out of "an altercation in which the injured employee is the initial physical aggressor." Defendant cites the case of *Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 720, in which Halfred Mathews, fists clenched, crossed a line in the dirt drawn by a co-worker, Marcus Cedillo, then "lunged toward Cedillo to grab or strike him" when Cedillo fatally struck Mathews in the head with a rock (6 Cal.3d at 725). The majority opinion of the California Supreme Court upheld the finding of the WCAB that because Mathews was the "initial physical aggressor," Labor Code § 3600 barred his widow's claim for death benefits. Justice Stanley Mosk's strong dissent in *Mathews* eloquently points out the difficulty and inequity in applying the initial aggressor defense to an altercation that itself arose out of and in the course of employment. Nevertheless, the initial aggressor defense remains in the Labor Code, and must be applied despite "[t]he homely fact that, long after a quarrel is over, it is often almost impossible to determine who really started it" *(Mathews,* supra, 6 Cal.3d at 74l(majority opinion) and 726 (dissenting opinion), both citing 1 Larson, Workmen's Compensation Law (1968 ed.)§ 1 l.15(c), p. 159).

Applicant's answer to the petition correctly distinguishes the facts in *Mathews* from the present case. Not only was there no physical contact until Mr. Brown put his finger or hand on applicant's nose or face, but there was no physical aggression by either party up until that point that would constitute a "real, present and apparent threat of bodily harm" *(Mathews,* supra, 6 Cal.3d at 726-727, citing *Briglia v. Industrial Accident Commission* (1962) 27 Cal.Comp.Cases 217, 218). Defendant's petition argues that the evidence does not justify the findings of fact and that it was in excess of the undersigned's power not to find that applicant was the initial physical aggressor, but nothing in Mr. Brown's demeanor while testifying suggested that he ever felt any real, present and apparent threat of bodily harm from applicant.

Because the verbal exchange between applicant and Mr. Brown did not involve any physical contact until Mr. Brown raised his finger (or hand) to applicant's nose (or face), that point of initial physical contact was found to be the point of initial physical aggression, focusing on the word "physical" in Labor Code § 3600(a)(7). Physical, not verbal, aggression is the literal standard employed by the legislature, and § 3600(a)(7) must be applied in a literal and dispassionate manner to find a "physical" aggressor, and not a verbal antagonist, because workers' compensation is a no- fault system. The majority opinion in *Mathews* agreed that physical conduct is required and not just words, no matter how insulting, noting that "one is not an 'initial physical aggressor' so long as he confines his antagonism to arguments, epithets, obscenities, or insults" *(Mathews,* supra, 6 Cal.3d at 727). Accordingly, the question in this case is who made the first physical aggression, and not who is responsible for the conflict. It

was found that Mr. Brown, having had enough of applicant's words, was the first to tum the conflict from a verbal exchange into a physical one when he pushed applicant's face in a hostile manner. This face-touching does not appear to have been done in self- defense, and while Mr. Brown was probably justifiably annoyed by applicant's comments and unwanted presence, it cannot be said from his testimony and demeanor that he felt even the least bit physically threatened by either applicant's words or his proximity.

Thus, it appears from the evidence that while applicant was the initial verbal aggressor, Mr. Brown was the initial physical aggressor, and therefore applicant's claim is not barred by Labor Code§ 3600(a)(7). All other aspects of the decision, which were not challenged by the petition, may be deemed waived by operation of Labor Code§ 5904.

IV
RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be denied.

Date: December 22, 2022

Clint Feddersen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE