

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

**TYLER SABO, *Applicant***

**vs.**

**MODERN CHARM BOUTIQUE;  
STATE FARM INSURANCE, ADMINISTERED BY SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ11495426  
Bakersfield District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted reconsideration<sup>1</sup> in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks reconsideration of the February 23, 2022 Rulings on Evidence, Findings of Fact and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a sign holder/spinner on August 25, 2017, sustained industrial injury to his left leg, psyche and back. The WCJ found that applicant sustained 41% permanent partial disability with the provision for future medical care. The WCJ further determined that applicant had a net recovery of \$103,529.99 from a third-party case, that the potential value of applicant's civil case was \$10,000,000, and that the employer's negligence contributed 20% to applicant's injury.

Defendant contends that the record does not support the WCJ's finding that the employer's negligence was a substantial factor causing harm to applicant, that the dangers inherent to applicant's employment as a sign spinner were common knowledge, and that the assessment of economic and non-economic damages were not based on substantial evidence.

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<sup>1</sup> Commissioner Lowe, who was on the panel that granted reconsideration to further study the factual and legal issues in this case, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed in the WCJ's Report, which we adopt and incorporate as the decision of the Workers' Compensation Appeals Board, and for the reasons discussed below, we will affirm the F&A.

In *Martinez v. Associated Engineering & Constr. Co.* (1979) 44 Cal. Comp. Cases 1012, [1979 Cal. Wrk. Comp. LEXIS 2756] (Appeals Bd. en banc), we held that the evaluation of a defendant's claim of credit rights required the following analysis:

First, defendant has the burden of proof to establish its right to claim a credit. It must show that there was a third party settlement and that it has paid out compensation benefits or will likely have to pay such benefits in the future. This can be done by production of certified copies of the Superior Court documents reflecting a settlement or judgment. Normally however, as in this case, copies of the documents or a stipulation as to applicant's net recovery will suffice. In this case the net recovery was stipulated to be \$114,000 and applicant admitted receipt of substantial benefits from the compensation carrier. Further, it is apparent from the evidence that he would be entitled to substantial benefits in the future absent any credit right.

Second, once a prima facie case has been made to show entitlement to credit, applicant has the burden of proof to establish the employer was negligent in any degree. If there is no employer negligence, the carrier is entitled to full credit. In this case, applicant not only established employer negligence, but 100% employer negligence.

Third, the burden of going forward shifts to the employer or carrier to show comparative negligence of the third party defendant or defendants and any negligence by applicant. In this case, defendant offered no evidence and the deposition testimony, as we will explain below, does not aid defendant.

Fourth, the burden then shifts to applicant to establish his total damages, i.e., that figure to which the employer's negligence is applied after deducting applicant's proportionate share of comparative negligence, to determine credit in accordance with the formula in [*Associated Construction and Engineering Co. v. WCAB (Cole)* (1978) 22 Cal. 3d 829 [43 Cal. Comp. Cases 1333]]. In this case, it was unnecessary for applicant to prove, or the workers' compensation judge to determine, applicant's actual damages in view of the finding on employer negligence. Thus, where the evidence establishes 100% employer negligence, or overwhelming employer negligence, or even a high degree of

employer negligence, it would be necessary to take only enough evidence to establish that compensation benefits could not possibly exceed the employer's share of the damages. It is not necessary for us to determine in this case the extent of the inquiry into overall damages. (*Id.* at 1021-1022.)

Here, the parties did not dispute the defendant's right to seek a credit based on applicant's third-party recovery. With respect to the evaluation of negligence, the WCJ found that the credible testimony of applicant's witnesses, "proved by a preponderance of the evidence that Petitioner's act of sending an unsupervised, untrained minor to stand on a sidewalk near this intersection was a breach of the duty to provide a safe work place." (Report, at p. 3.) The WCJ further determined that the credible testimony of applicant's civil attorney Mr. Hall fixed the value of a civil suit at \$10,000,000, and that the testimony of Mr. Hall was more persuasive than defendant's assessment of future medical costs which did not address all of the admitted injury. (*Ibid.*) Mr. Hall further testified that the failure of applicant's employer to provide a safe workplace contributed 20% to 25% of the fault for the industrial injury. (Report, at p. 3; see also Opinion on Decision at pp. 4-5.)

We accord to the WCJ's credibility determinations the great weight to which they are entitled. (*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**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Finding of Fact, Award and Order, dated February 23, 2022 is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**February 24, 2023**

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

**TYLER SABO  
LEVITON, DIAZ, WHITING & GINOCCHIO  
GOLDMAN, MAGDALIN & KRIKES  
GHITTERMAN, GHITTERMAN & FELD**

**SAR/abs**

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**

**RECOMMENDATION:                   DENY**

**INTRODUCTION**

Trial in the primary proceedings of the above captioned case was held on March 26, 2021 and May 14, 2021. The Trial was continued on May 14, 2021 for additional testimony by Applicant's expert witness Jerry Hildreth. The witness encountered health problems that prevented additional in person testimony and the parties agreed to file an Offer of Proof to complete the testimony of Mr. Hildreth. The case was submitted for decision on January 27, 2022 to Workers Compensation Judge Christopher M. Brown. A Rulings on Evidence, Findings of Fact, Awards and Order; Opinion on Decision was issued on February 23, 2022. Defendant filed a timely, verified and sufficiently served Petition for Reconsideration on March 11, 2022.

Petitioner states the legal basis for the Petition is Labor Code Sections 5903(a), (c) and (e). Specifically, Petitioner asserts the WCJ erred by issuing a determination that employer negligence contributed to the injury that resulted in the amputation of Applicant's left foot.

**STATEMENT OF FACTS**

Tyler Sabo (Applicant) was seventeen (17) years old and employed as a sign holder/spinner, Occupational Group Number 214, at Bakersfield, California by Modern Charm Boutique (Employer) on August 25, 2017 when he sustained an injury arising out of and in the course of his employment to his left leg, psyche, and back. (MOH 3-26-21 Page 2 Lines 5 – 9)

The parties stipulated that Applicant has 41% permanent partial disability after appropriate adjustments as a result of his industrial injury. (MOH 3-26-21 Page 2 Lines 40 - 41) The parties stipulated that Applicant requires further medical care to cure or relieve the effects of his industrial injury. (MOH 3-26-21 Page 2 Line 43)

The parties stipulated that Applicant's net recovery from the related third-party civil action was \$103,529.99. (MOH 3-26-21 Page 2 Lines 37 – 38)

## DISCUSSION

### **PETITIONER FAILED TO ESTABLISH A BASIS FOR RECONSIDERATION PURSUANT TO LABOR CODE § 5903(a)**

The basis for Petitioner asserting a Labor Code § 5903(a) argument is unclear. The Board has jurisdiction over controversies between an employer and employee and shall resolve the disputes upon request of either party.<sup>2</sup> The parties clearly submitted the issue of Defendant's entitlement to an order on third-party credit pursuant to Labor Code Section 3861 to the WCJ for decision. (MOH 3-26-2021 Page 3 Lines 5-6) Title 8 CCR § 10330 states:

In any case that has been regularly assigned to a workers' compensation judge, the workers' compensation judge shall have full power, jurisdiction and authority to hear and determine all issues of fact and law presented and to issue interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case, including the fixing of the amount of the bond required in Labor Code section 3715. Orders, findings and decisions and awards issued by a workers' compensation judge shall be the orders, findings, decisions and awards of the Workers' Compensation Appeals Board unless reconsideration is granted. (Title 8, CCR § 10330)

Petitioner has not established that the issuance of a determination that Defendant's right to assert the credit is limited by employer negligence exceeds the authority of the WCJ. Therefore, Petitioner failed to establish a basis for granting reconsideration pursuant to Labor Code § 5903(a).

### **APPLICANT PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT EMPLOYER'S BREACH OF ITS DUTY TO PROVIDE A SAFE WORK PLACE CAUSED AT LEAST 20% OF HIS INDUSTRIAL INJURY AND THE FULL REASONABLE VALUE OF HIS THIRD-PARTY ACTION WAS AT LEAST \$10,000,000.00**

Petitioner correctly states that the elements for establishing negligence are (1) a legal duty, (2) breach of the legal duty, (3) breach of the legal duty being a cause of the damages.<sup>3</sup> (Petition

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<sup>2</sup> Labor Code §4604.

<sup>3</sup> The Petition references several jury instruction forms that are not in evidence and were not referenced at trial. Regardless, the only substantial evidence in the case on the issue of causation is the expert opinions of Mr. Hall and Mr. Hildreth that the employer's breach of duty to provide a safe work place caused 20-25% of the damages to Applicant.

Page 3) Decisions in workers' compensation cases must be based on a preponderance of the evidence.<sup>4</sup> Decisions may not be based on a preponderance of the argument. In this case Applicant presented the expert testimony of John Hall and Jerry Hildreth as expert witnesses on the issues of legal duty, breach of legal duty, causation and damages. The WCJ determined these expert witnesses provided credible testimony related to these issues. Petitioner did not offer any rebuttal witnesses.

The testimony of Mr. Hildreth established Defendant's duty created by the Labor Code to provide a safe work environment for employees. He provided an expert opinion that sending a minor child out to stand at the intersection where the injury occurred without any training or guidance constituted a breach of the duty to provide a safe workplace. He credibly stated his expert opinion was based on his review of the CHP report, deposition transcripts and no record of employee training regarding the hazards presented. (OOD Page 5) Mr. Hildreth's testimony clearly explained how he reached his expert legal opinion regarding Petitioner's legal duty and the breach of this duty. The WCJ also consider the undisputed fact that Applicant was a minor at the time of the accident. (OOD Page 5) Petitioner provided no testimony or evidence to contradicting Mr. Hildreth's expert testimony. It was determined the testimony of Mr. Hall and Mr. Hildreth proved by a preponderance of the evidence that Petitioner's act of sending an unsupervised, untrained minor to stand on a sidewalk near this intersection was a breach of the duty to provide a safe work place.

Petitioner's next argument appears to assert that Applicant would have been struck by the car in the absence of Petitioner paying him to stand where he was. However, the parties stipulated that Applicant's injury arose out of and in the course of his employment. (MOH 3-26-2021 Page 2 Lines 5 – 9) The stipulation is supported by Applicant's credible testimony that the only reason he was at the place the accident occurred was because Petitioner instructed him to stand there holding a sign and paid him to perform the action.

Petitioner sent an unsupervised, untrained minor out to the location and Applicant was injured within hours of the assignment. Mr. Hall credibly testified that Petitioner's breach of its duty was 20-25% of the cause of Applicant's injury and that Applicant's third-party civil action had a value of \$10,000,000.00. (SOE 3-26-21 Page 5 & 8) He explained both how and why he reached his expert opinion. Petitioner provided an assessment of future medical costs that did not

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<sup>4</sup> Labor Code Sections 3202.5 and 5705.

address all of the admitted injury to Applicant. The WCJ determined this document did not outweigh the credible testimony of Mr. Hall's. (OOD Page 4)<sup>5</sup> Therefore, Applicant proved by a preponderance of the evidence that Petitioner's negligent breach of its duty to provide a safe work place caused 20% of the damages to Applicant, and that the reasonable value of his third-party action was \$10,000,000.00.

Petitioner also states there is no evidence of future wage loss by Applicant. However, Petitioner stipulated that Applicant has 41% permanent partial disability as a result of this injury. (MOH 3-26-2021 Page 2 Lines 40 – 41) The stipulation to 41% permanent partial disability is evidence of decreased future earning capacity. (SRPD 2005 Page 1-2)

Petitioner states the Opinion on Decision is void of a breakdown of special damages (economic) and general damages (non-economic). The OOD clearly references Mr. Hall's expert testimony that the value of Applicant's economic damages is \$4,000,000.00 to \$5,000,000.00. (OOD Page 5) Mr. Hall's testimony established by a preponderance of the evidence the full value of Applicant's third-party action was at least \$10,000,000.00. Therefore, the non-economic damages would value between \$5,000,000.00 and \$6,000,000.00. Petitioner's Post-Trial Points and Authorities states that a multiplier of five times the economic damages is appropriate for determining non-economic damages based on the injuries suffered by Applicant. (Def. Post-Trial P&A Page 10 Lines 16 – 19) Applicant's non-economic damages would have a reasonable value of \$20,000,000.00 to \$25,000,000.00 based on Mr. Hall's expert valuation of Applicant's economic damages and Defendant's suggested multiplier.

Mr. Hall's testimony referenced a civil case similar to Applicant's wherein the plaintiff was awarded \$18,000,000.00 in non-economic damages. He additionally credibly testified that the high end value of Applicant's third-party action could be \$20,000,000.00. (SOE 3-26-21 Page 5) He also testified that employer negligence caused 20 – 25% of Applicant's injury. (SOE 3-26-21 Page 8) The WCJ relied on Mr. Hall's valuation of Applicant's combined economic and non-economic damages at \$10,000,000.00 and the 20% causation for determination of the threshold for Petitioner asserting the allowed credit being \$2,000,000.00.<sup>6</sup>

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<sup>5</sup> Petitioner asserts the WCJ did not "provide any facts or substantial evidence to support Finding of Fact No. 9." However the OOD clearly references the credible testimony of Mr. Hall which is detailed in the Summary of Evidence. (OOD Page 4)

<sup>6</sup> If the higher values of \$20,000,000.00 for combined economic and non-economic damages is multiplied by 25% employer fault the threshold for asserting the \$103,529.99 credit would be \$5,000,000.00.



## CONCLUSION

The credible testimony of both Mr. Hall and Mr. Hildreth were found to be substantial expert evidence regarding the issue of employer negligence and causation. The credible testimony of Mr. Hall was also found to be substantial evidence of the value of Applicant's third-party action. There is no evidence in the record that outweighs the testimony of Mr. Hall and Mr. Hildreth. Petitioner did not provide any expert testimony on the issue of employer negligence. The WCJ found that there is no evidence in the record that outweighed the expert opinions of Mr. Hall and Mr. Hildreth. Applicant proved by a preponderance of the evidence that (1) Petitioner had an affirmative duty to provide a safe work place, (2) Petitioner breached this duty when it sent Applicant, a minor, to work without training or instructions and that (3) Petitioner's breach of its duty caused in fact damages to Applicant.

The credible testimony of Mr. Hall proved by a preponderance of the evidence that the full value of Applicant's third-party action was at least \$10,000,000.00 dollars, and that Petitioner caused at least 20% of these damages. Applicant established by a preponderance of the evidence that the employer's negligent breach of its duty to provide a safe work place caused \$2,000,000.00 in damages to him. The WCJ's Findings of Fact 7, 8 & 9 are supported by the credible testimony of both Mr. Hall and Mr. Hildreth as expert witnesses. These Findings of Fact support Award and Order Number 4 that Petitioner must provide \$2,000,000.00 in workers compensation benefits to Applicant before asserting its credit for Applicant's net recovery in the amount of \$103,529.99 from the third-party civil action. Therefore Petitioner has not established a basis for Reconsideration pursuant to Labor Code Section 5903 (a), (c) or (e) and the Petition should be denied.

DATE: MARCH 22, 2022

**Christopher Brown**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE