

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

**ANDREW PING XIE, *Applicant***

**vs.**

**JJH CONSTRUCTION INCORPORATED; UNITED WISCONSIN INSURANCE  
COMPANY, *Defendants***

**Adjudication Number: ADJ13906646  
Long Beach District Office**

**OPINION AND ORDER  
DENYING PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge (WCJ) Findings and Order of June 29, 2021, wherein it was found that "applicant did not meet his burden to prove injury arising out of and occurring in the course of employment to his left foot." The WCJ thus issued an Order that applicant take nothing by way of his workers' compensation claim.

Applicant contends that the WCJ erred in finding that he did not sustain industrial injury as alleged. Applicant also argues that a computerized printout from the Colorado Bureau of Investigation listing applicant's purported criminal record in Colorado, including arrests, misdemeanor and felony convictions should not have been admitted into the evidentiary record. We have not received an answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

As explained below, we affirm the WCJ's finding that applicant did not sustain his burden of proving industrial injury.<sup>1</sup> We therefore deny applicant's Petition for Reconsideration.

Applicant testified at trial that he injured his left foot after stepping on debris at work. However, when seeking treatment at urgent care on the date of injury, he gave a history of injuring himself stepping on a rock at the beach. Additionally, applicant certified on his weekly time sheet

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<sup>1</sup> Since the WCJ found the applicant's testimony not credible "irrespective of Defendant's Exhibit A" (Opinion on Decision at p. 3), any error in admitting this document would be harmless. The WCJ came to his decision independent of this evidence, and we have given the evidence of the felony conviction no weight in affirming the WCJ's decision.

just the day after the injury that he did not sustain any work injuries that week. When applicant sought further treatment, he gave a history of a work injury, and later reported his injury at work.

Applicant testified at trial that he gave a false history when first seeking medical treatment because he believed that the injury being work related would somehow be to his wife's detriment in immigration proceedings, but that he later gave a true history after seeing that the injury was more serious than initially imagined.

The WCJ disbelieved the applicant's testimony that his injury was sustained in the course of employment, stating in his Opinion on Decision and Report that he did not find applicant's testimony to be credible.

As the Court of Appeal has recently held:

Venerable precedent holds that, in a bench trial, the trial court is the "sole judge" of witness credibility. (*Davis v. Kahn* (1970) 7 Cal.App.3d 868, 874.) The trial judge may believe or disbelieve uncontradicted witnesses if there is any rational ground for doing so. (*Ibid.*) The fact finder's determination of the veracity of a witness is final. (*People v. Bobeda* (1956) 143 Cal.App.2d 496, 500.) Credibility determinations thus are subject to extremely deferential review. (*La Jolla Casa deManana v. Hopkins* (1950) 98 Cal.App.2d 339, 345-346 ["[A] trial judge has an inherent right to disregard the testimony of any witness ... . The trial judge is the arbiter of the credibility of the witnesses".])

(*Schmidt v. Superior Court* (2020) 44 Cal.App.5th 570, 582 [emphasis added].)

Similarly, in workers' compensation proceedings, a WCJ's credibility determinations are "entitled to great weight because of the [WCJ's] 'opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand ...' [Citation.]" (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)

"The applicant for workers' compensation benefits has the burden of establishing the 'reasonable probability of industrial causation'" (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.App.4th 644, 650 [63 Cal.Comp.Cases 253] citing *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660]; Lab. Code, §§ 3202.5, 5705.) Here, since his testimony was found not credible, applicant neither set forth a prima facie case, nor carried his ultimate burden of proof.

While applicant states in his Petition that he was entitled to a presumption of compensability pursuant to Labor Code section 5402(b), the record in this matter does not support the establishment of this presumption. Labor Code section 5402(b) states, "If liability is not

rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period.” In *Honeywell v. Workers’ Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24 [70 Cal.Comp.Cases 97], the California Supreme Court expressly held that, except where estoppel has been established, the 90-day period to accept or deny liability runs from the date that an injured worker filed an actual claim form, not when applicant reported his or her injury, or when the employer otherwise gained knowledge of injury. “‘A presumption is an assumption of fact that the law *requires* to be made from another fact or group of facts found or otherwise established in the action.’ ( Evid. Code, § 600, subd. (a), italics added; *State Compensation Ins. Fund v. Workers’ Comp. Appeals Bd.* (1995) 37 Cal. App. 4th 675, 682 [60 Cal.Comp.Cases 717].) As correctly articulated in *Davis [v. Interim Healthcare]* (2000) 65 Cal.Comp.Cases 1039, 1043 (Appeals Bd. en banc), ‘a presumption becomes operative at trial when the basic facts giving rise to the presumption are established by the pleadings, by stipulation, by judicial notice, or by evidence.’” (*Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 [67 Cal.Comp.Cases 236].)

Here, no evidence was presented that applicant ever filed the DWC-1 claim form that would have initiated the 90-day period for the defendant to accept or deny the claim. There is not a DWC-1 claim form in the exhibits identified or admitted into the evidentiary record at trial. Applicant did not testify to giving his employer a completed DWC-1 claim form. The electronic file in this matter contains two DWC-1 claim forms, one hand-written and dated August 21, 2020 and the other typed and dated November 24, 2020, but even if we were to consider these documents, nothing indicates that they were ever given to the employer. The personnel file admitted into the evidentiary record contains evidence that employer was notified of applicant’s injury on August 25, 2020, but the personnel file does not contain a DWC-1 claim form or any notation that one was received.

Accordingly, no burden-shifting presumption ever arose in this matter. Applicant did not carry his burden of showing injury occurring out of and in the course of his employment. We therefore deny applicant’s Petition.

For the foregoing reasons,

**IT IS ORDERED** that Defendant's Petition for Reconsideration of the Findings and Order of June 29, 2021 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

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



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

**September 21, 2021**

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

**ANDREW PING XIE  
PRATT WILLIAMS  
MICHAEL SULLIVAN & ASSOCIATES**

**DW/oo**

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