

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

DONTAY WALKER, *Applicant*

vs.

**LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,
*permissibly self-insured, Defendant***

**Adjudication Number: ADJ12952897
Marina del Rey 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 determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*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 determination. (Id.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 14, 2023

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

**DONTAY WALKER
LAW OFFICES OF REUBEN FELSTINER
LAW OFFICES OF DANIEL DONAHUE**

AH/cs

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 OF WORKERS' COMPENSATION JUDGE ON
PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

- | | |
|---|---|
| 1. Applicant's Occupation: | Bus Operator, Group 250 |
| 2. Applicant's Age: | N/A |
| 3. Date of Injury: | Specific of 01-14-2020 |
| 4. Body Parts Injured: | Various; initial physical aggressor only Issue tried. |
| 5. Manner in Which Injury Occurred: | Alleged altercation on bus |
| 6. Identity of Petitioner: | Defendant filed |
| 7. Timeliness: | Petition was timely filed |
| 8. Verification: | Petition was verified per LC Section 5902 |
| 9. Date of issuance of Finding of Fact: | 05-30-2023 |
| 10. Petitioner's Contentions: | |

(a) Petitioner contends the WCJ erred by making conclusory statements and has provided no reasoning for his decision in violation of Labor Code (LC) Section 5313.

(b) Pursuant to LC3600 (A) (7), the WCJ erred by saying the applicant was not the initial aggressor.

**II.
FACTS**

The WCJ feels the defendant has accurately stated the facts in the subsection captioned "Facts" with one exception. The defendant stated at the top of page 3 of his Petition for Reconsideration (PFR) that the defendant was asserting that the DVD in Court X1 "shows that the applicant was, in fact, the initial aggressor when he closed the bus doors on the passenger, resulting in the altercation." The WCJ would point out that this is the defendant's assertion and is not a fact and is the crux of the issue in the case and is a point where the defendant and the WCJ have a sharp disagreement.

III.
DISCUSSION OF PETITIONER’S CONTENTIONS

A. THE JUDGE HAS MADE CONCLUSORY STATEMENTS AND HAS PROVIDED NO REASONING FOR HIS DECISION, IN VIOLATION OF LABOR CODE SECTION 5313

This case did not involve the usual panoply of issues in Workers’ Compensation, only the “doorstep” issue of whether the applicant was the initial physical aggressor in an alleged altercation. Also, as a result of the time the WCJ spent with the parties prior to going on the record, and the excellent preparation of both sides, we were able to streamline the issues to the point that we only had one witness (the applicant) and minimal evidence. The most important evidence was the four-minute DVD of 01-14-2020 of the alleged altercation of 01-14-2020 in Court Exhibit X1.

The WCJ explained in his Opinion on Decision that his decision was based on applicant’s credible and un rebutted testimony and the information in the DVD in Court Exhibit X1. The WCJ can appreciate that considering the amount of work both attorneys in this case put in, they would expect to see more analysis from the WCJ in his Opinion on Decision. While the WCJ feels he has provided sufficient analysis to meet the requirements of LC5313, because of the high regard he has for the two attorneys in this matter and the issues at stake, he is going to provide a more detailed analysis of his thought process on how he arrived at his conclusion.

Firstly, the WCJ felt the DVD in Court Exhibit X1 was the most important piece of evidence and/or information in this case. The WCJ watched the DVD several times before he issued his Opinion on Decision on 05-30-2023. The WCJ watched the DVD two more times on 06-16-2023 when he received the PFR. The WCJ has a respectful difference of opinion from the defense attorney on what the DVD shows. Incidentally, the WCJ’s summary of what he saw in the DVD in Court Exhibit X1 is set out in the Summary of Evidence (SOE) of 05-18-2023 on page 6 line 18 through page 7 line 6. The defense attorney never quoted this in his PFR.

The person with whom the applicant is alleged to have had the supposed altercation, has been referred to as the “passenger in question.” The defendant seems to believe that the passenger in question was in the process of getting on the bus and as he was apparently crossing the threshold of the doorway of the bus the applicant (bus operator) closed the bus doors on his body, and this act was an act of initial physical aggression. If the WCJ had seen such an act on the DVD, the WCJ might be inclined to agree that the applicant/bus operator was the initial physical aggressor. The problem is, the WCJ did NOT see any such act on the DVD of 01-14-2020 in Court Exhibit X1.

Instead, the WCJ saw the following on the DVD of 01-14-2020 in Court Exhibit X1. The bus pulled up to the bus stop and the front door of the bus opened, so people could exit. Two people got on the bus right away. One person, the passenger in question, stood just OUTSIDE of the front door of the bus, but did not get on. Then seconds passed and he still did not get on. The front door of the bus began to close while the passenger in question was still OUTSIDE of the bus. The passenger in question was NOT crossing the threshold of the bus doorway when the bus doors began to close. The passenger in question then forcefully put one of his arms and one of his legs into the bus doors and the bus doors automatically opened and the passenger in question got onto the bus. This is what the WCJ saw in the DVD of 01-14-2020. The WCJ wants the Commissioners to review the DVD to find out if they see something different.

Defense attorney has challenged the WCJ's suggestions that applicant's testimony was credible and un rebutted. Firstly, there were no other witnesses, so only the DVD in Court X1 could rebut applicant's testimony and the WCJ feels that Court Exhibit X1 reinforces rather than rebuts applicant's version of who was the initial physical aggressor.

The WCJ acknowledges that during the cross examination of applicant, the defense attorney pointed out some inconsistencies applicant had in his testimony, but by and large the applicant's testimony remained accurate and believable on the main points about who was the initial physical aggressor.

Please note this was an in-person trial and the WCJ had a serious opportunity to assess the credibility of the applicant as a witness.

B. PURSUANT TO LC3600 (A) (7) THE WCJ ERRED BY SAYING THE APPLICANT WAS NOT THE INITIAL AGGRESSOR

When there is an injury arising out of a work-related altercation, and the injured worker is the "initial physical aggressor," LC 3600 (A) (7) bars her or him from a recovery. Determining the initial physical aggressor is a question of fact for the WCJ at trial. The burden of proof in determining an initial physical aggressor falls on the employer. The test is who first engaged in physical conduct that a reasonable person would perceive to be a real, present, and apparent threat of *bodily* harm. (Emphasis added). Please see *Los Angeles County MTA v. WCAB (Hicks)* (2006) 71 CCC 641 (writ denied). This case echoed earlier authority mentioned in defendant's PFR.

Please see *Matthews v. WCAB* (1972) 37 CCC 124. The defendant has correctly pointed out in his PFR on page nine that the burden of proof rests with the defense side to prove the initial

physical aggressor. This is often no easy task, and each case has its own unique set of facts. In the instant case, the evidence shows the defendant has fought valiantly but has failed to meet the burden of proof.

The touchstone for what constitutes conduct equaling initial physical aggression according to the *Matthews* case, *supra*, at page 127, is who first places his or her opponent in reasonable fear of *bodily* harm. (Emphasis added). In our instant case, on 01-14-2020 the applicant/bus operator possibly failed to wait long enough for the slow-poke passenger-in-question who was standing outside the bus. The applicant/bus operator closed the bus doors while the passenger-in-question waited just outside the bus doors. Was this an act of impatience by the applicant/bus operator? Maybe.

Was the applicant/bus driver being someone who (according to the *Hicks* and the *Matthews* Case Standard) “first placed his opponent in fear of bodily harm?” Certainly not. What would the consequences be if the applicant/bus operator had closed the bus doors in a moment of impatience and driven off? Bodily harm? No, the passenger-in-question would, at worst, have had to wait 10-15 minutes for the next bus. There is no way the applicant/bus operator meets the standard for being an initial aggressor under the cases quoted in the defense attorney’s own PFR.

However, the applicant/bus operator did not drive off. The passenger-in-question forcefully shoved his arm and leg into the bus doors as he stood completely outside of the bus, and the bus doors automatically opened, and the applicant/bus operator welcomed him onto the bus.

The defense attorney’s arguments about applicant’s testimony that applicant felt he gave the passenger-in-question ample time to enter the bus are irrelevant in terms of showing whether the applicant was the initial physical aggressor. The defense attorney argues in his PFR that the DVD in Court Exhibit X1 shows that “clearly the applicant was not hit on his hat” by the rock that the passenger-in-question allegedly threw. While the video is somewhat grainy, it shows that the passenger-in-question made a threatening throwing motion toward the applicant/bus operator when he got off of the bus. This could be easily construed as “first placing his or her opponent in reasonable fear of bodily harm,” which is the standard for initial first physical aggressor, set out in *Hicks* and *Matthews*, *supra*. Whether the applicant was hit by a rock does not really reflect whether the applicant meets the initial physical aggressor standard.

The defense attorney has also suggested that the passenger-in-question at first hesitated from entering the bus because he was counting his change for bus fare. This is speculative and

more importantly, it is irrelevant. The defense attorney has argued that bus operators are required to assist elderly and disabled passengers. The information we see in the DVD strongly suggests the passenger-in-question was neither elderly nor physically disabled. If there is a policy change the defense attorney wants to suggest to the MTA about requiring bus operators to be more patient with hesitating people on the curb of a bus stop, this is not the same thing as an initial aggressor defense. For the WCJ to say that the applicant is credible does not mean the WCJ finds the applicant 100% sympathetic.

The defense attorney has also attempted to attack the applicant's credibility based on the number and character of the injuries he is claiming. What is most important in this part of the case is what the DVD in Exhibit X1 shows about the initial physical aggressor and what the law is.

The WCJ appreciates the cases researched and cited by the defense attorney, but feels the cases in this area of the law are dependent on the unique sets of facts in each case. A case which may have some applicability for comparison is *Bekins Storage v. WCAB (Williams)* (1985) 50 CCC 240 (writ denied). It found that the physical act of brushing aside a co-worker does not constitute a real, present and apparent threat of bodily harm. This is the standard set of in *Hicks* and *Matthews*. In our instant case, it is difficult to see how anything the applicant/bus operator did put the passenger-in-question in "reasonable fear of bodily harm.["]

IV. RECOMMENDATIONS

For the reasons stated above, it is recommended the Petition for Reconsideration be denied.

DATED: June 19, 2023

Robert F. Spoeri
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE