

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

GARY CASTRO, *Applicant*

vs.

**ASSOCIATIONS, INC., DBA MASSINGHAM & ASSOCIATES;
AMERICAN ZURICH INSURANCE, *Defendants***

**Adjudication Number: ADJ9023911
Oakland District Office**

**OPINION AND ORDER
AFTER RECONSIDERATION**

The Appeals Board previously granted reconsideration to further study the factual and legal issues in this case.¹ This is our decision after reconsideration.

Applicant seeks reconsideration of the June 19, 2019 Findings and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) found that while employed on February 4, 2013, as a maintenance man by defendant, applicant claimed injury arising out of and occurring in the course of employment (AOE/COE) to various body parts; and that applicant was an initial physical aggressor in a confrontation that resulted in industrial injury so that his claim for benefits is barred by Labor Code section 3600(a)(7)².

Applicant contends that it is defendant's burden to show that the claim is barred under section 3600(a)(7) and that applicant provided credible testimony at trial; defendant failed to call any witnesses for testimony at trial; that the only evidence submitted by defendant with respect to the circumstances of the injury was the incident report from the police department; and that the investigating officer failed to conduct a complete and unbiased investigation.

We received an Answer from defendant. We received a Report and Recommendation from the WCJ, which recommends that we deny reconsideration.

¹ Commissioner Lowe, who on the panel that granted reconsideration, no longer serves on the Appeals Board. Another panelist was appointed in her place.

² Unless otherwise stated, all further statutory references are to the Labor Code.

We have considered the allegations of the Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below, we will rescind the June 19, 2019 F&O, and substitute a new F&O that finds that applicant sustained injury to his back/tailbone and to the right elbow and defers the issue of injury to any other body parts; finds that applicant was not the initial physical aggressor and that defendant did not meet its burden under section 3600(a)(7); and finds that applicant is entitled to medical treatment.

BACKGROUND

The WCJ's Report sets forth the following relevant factual background:

[...] Applicant was employed as a maintenance man by Massingham & Associates for a large apartment/condominium complex in Union City California. The claim arises from what became a physical altercation between the Applicant and Sau Nguyen, a trespasser in the complex where Applicant worked, in the early evening of February 4, 2013. As documented in the related Union City police report, Applicant was arrested that night for an alleged battery on Mr. Nguyen, "who wanted to press charges." (Defendant's Exhibit A.) Applicant disputed that version of events and testified at trial that he in fact was the victim of an attack by Mr. Nguyen, who initiated the physical altercation by running at him and head-butting him in the chest and knocking him to the ground. (MOH/SOE I at p. 8, MOH/SOE II at p. 6.) He also testified at trial "that he does not agree with any of the police report in this case." (MOH/SOE II at p. 10, lines 27-28.)

Subsequent to the arrest, the Applicant was twice taken by ambulances to Washington Hospital that night with requests for medical treatment, initially for his elbow and tailbone, and later for complaints of dizziness and hyperventilation before being booked, but was released each time back to the police without a hospital admission. (Defendant's Exhibit A at p. 3.) . . . He testified at trial that once in jail he had "excruciating" pain in his tailbone, chest, elbows, head, arms, and shoulder." (Id. at p. 11, lines 44-45.) Beyond the elbow and tailbone complaints, it was unclear to me whether these specific complaints were attributed to the altercation with Mr. Nguyen and/or the incident with the police at the hospital and/or both.

Mr. Castro was subsequently charged criminally by the Alameda County District Attorney, initially with a felony, but it was later dropped to misdemeanor assault, and [...] the DA eventually dropped all charges in 2015. (MOH/SOE I at p. 12, lines 1-19.)

As noted in the Applicant's testimony and the QME reports of Dr. Shaw, he has not worked for this employer and/or for any other since the night of the confrontation, February 4, 2013. (MOH/SOE I at p. 12, lines 31-32, Joint Exhibit 102 at p. 3.) In his first report, the QME summarized the evidence he reviewed by saying Applicant

claimed "multiple alleged specific traumatic industrial injuries related to an acute trauma on February 4, 2013 relative to an altercation with a[n] elderly, homeless/trespasser half his size, at his place of employment." (Joint Exhibit 104 at pp. 45-36.) [...] Dr. Shaw's report dated November 7, 2015, [...] finds injury AOE/COE to the right elbow, left shoulder, and low back/coccyx. (Joint Exhibit 104 at p. 43- 44.)

In a supplemental report dated January 9, 2016, QME Shaw was provided with and comments on the police report, with a request from defendant that he revisit/reconsider his finding of industrial injury to the left shoulder. (Joint Exhibit 103.) He then changed his opinion on causation with respect to the shoulder, concluding "The additional medical evidence reviewed does not support an acute industrial injury to the left shoulder. There is insufficient information as to AOE/COE for the left shoulder. Accordingly, it is my opinion, within reasonable medical probability, that 100% of causation for the *left shoulder is non-industrial.*" (*Id.* at p. 3, emphasis added.) This leaves his opinion that the low back/coccyx, right elbow, and right knee, were injured AOE/COE in this incident.

Per Applicant's trial testimony, he orally reported the claim to his supervisor, Cathy Mount, "immediately upon his release from jail." (MOH/SOE I at p. 12, lines 34-37.) He also testified he reported the injury to a Home Owner's Association (HOA) member, Sue Ray, but was not provided with a claim form by either woman [...] [when] he attended an HOA board meeting where his injury was discussed and where he spoke, and that the "the board agreed that he was entitled to workers' compensation benefits," and that Cathy initially agreed. (*Id.* at p. 12, lines 35-45, and p. 13, lines 1-8.) He eventually obtained a DWC-1 claim form from an Information and Assistance Officer at the Oakland WCAB, which he then mailed to Cathy Mount, and presumably is what triggered the subsequent Zurich denial of his claim dated April 18, 2013. (MOH/SOE I at p. 12, lines 39-41, and p. 12, lines 10-12, Defendant's Exhibit C.)

The admitted evidence also contains a long typewritten statement from Applicant to Zurich on Zurich's Proof of Claim form, which is signed and dated by Applicant on March 27, 2013. (Applicant's Exhibit 12.) That written account is consistent with . . . Applicant's trial testimony, namely that Mr. Nguyen was the initial physical aggressor, and is the one who charged and head-butted Mr. Castro in the chest, knocking him down and standing over him. (MOH/SOE I at pp. 8-9.) Attached to that statement are two additional handwritten statements from reported witnesses to Applicant's altercation with Mr. Nguyen, Deone Esser and Dennis Cave, who lived in the complex. (*Id.*) [...]

The Deone Esser statement is notarized, signed, and dated February 16, 2013. The statement in relevant part reads as follows:

"I witnessed this Asian man attack the maintenance man by ramming his head into his stomach. Therefor [sic] causing the maintenance man to fall on his back and hitting his head on the cement. The maintenance man put his foot up when the Asian guy charged at him again to keep the Asian man from attacking him. The maintenance man never put his hands on the Asian man. He was yelling out, telling the Asian man to keep his hand on [sic] him, but the Asian man kept trying to hit him." (Applicant's Exhibit 12.)

The Dennis Cave statement is not dated or notarized, but appears to be signed by Mr. Cave. It reads in its entirety as follows:

"I, Dennis Cave, witnessed a short Asian man assaulting a man that appeared to be the maintenance man. The thing that attracted my attention is that I heard yelling from the maintenance man saying "get away from me" and "leave me alone." After hearing the commotion I then walked outside onto my balcony and witnessed the maintenance man being charged at by the short Asian man, he lowered his head and rammed his head into the maintenance man's mid-section. The maintenance man fell very hard after being hit, then he made it to his feet and tried to walk away. After this I saw the maintenance man walking through apartments away from the short Asian man towards the street, then the short Asian man continued to follow the maintenance man. After this I lost sight of what was going on. I was standing outside when the cops showed up smoking a cigarette and the police didn't take anyone's statements at the scene when I was out there. Note: The short Asian man had slurred speech, he sounded very angry and intoxicated. My statement is true and correct." (Applicant's Exhibit 12.)

Applicant adamantly maintains that the police report is not true or accurate and that despite his arrest, he was the victim of an unprovoked assault by Mr. Nguyen, in which Mr. Nguyen intentionally cut his own hand to make it bleed and rushed Applicant, head-butting him in the chest and knocking him down, causing him to land on his coccyx, and right elbow and to fall backwards, hitting his head.

The Union City Police Department for this incident prepared by police officer Christopher Figueiredo, which was printed on February 5, 2013, as included in subpoenaed records obtained by copy service U.S. Legal Support, was admitted into evidence as Defendant's Exhibit A, on the first day of trial over Applicant's objection that it was hearsay. (MOH/SOE I at p. 6.) In the absence of testimony from Sau Nguyen and police officers Figuerido and/or Nguyen (who I assume was no relation to the trespasser), which I would like to have heard from, but unfortunately was not offered by either party, this is the sole evidence supporting defendant's assertion that it was the Applicant who was the initial physical aggressor. Pursuant to the summary narrative in page 1 of that report:

"On 02/04/13, at approximately 1906 hours the VIC/Nguyen was collecting recyclables from trash bins in the area of Peacock Place in Union City. VIC/Nguyen was confronted by ARR/Castro who began yelling at him. ARR/Castro frightened VIC/Nguyen, who then attempted to run away. ARR/Castro chased and ultimately caught up to the victim, before kicking him in the chest and knocking him to the ground. The victim sustained large lacerations to his hands and was transported to the hospital for treatment. ARR/Castro was extremely difficult and uncooperative, ultimately delaying the booking process by several hours. This case is cleared due to the arrest of ARR/Castro."

The more detailed narrative on pages 2-3, in relevant part states:

"On 02/04/13 at approximately 1906 hours, I responded to a Code 3 to the report of a possible stabbing in the area of Skylark Drive and Peacock Place. Upon arrival I located the victim, later identified as VIC/Nguyen and REP/Fuentes. REP/Fuentes provided the following information: REP/Fuentes was driving by when he was flagged down by the victim. REP/Fuentes said that the victim looked frightened and he could see that he was bleeding. REP/Fuentes stopped to help him, but had trouble communicating with him because of a language barrier so he just told his mother to call 911. I then contacted the victim who had large abrasions and lacerations on his hands, which were bleeding. The victim's left hand had a large flap of skin hanging from his palm.

Due to the language barrier with VIC/Nguyen, I asked Officer Nguyen to speak with him and obtain a statement. The following is a brief summary of the information VIC/Nguyen provided: VIC/Nguyen was collecting recyclables in the area of Peacock Place when he was confronted by the subject. The suspect shouted at him, chased him, and kicked him in the chest, knocking him to the ground. VIC/Nguyen grabbed onto the suspects legs, in an attempt to protect himself from being kicked again, as the suspect stood over him. The suspect broke free and left the area. VIC/Nguyen received the previously described injuries to his hands, along with some difficulty breathing and pain to his chest.

As VIC/Nguyen was speaking with Officer Nguyen, he pointed out a subject standing among the small crowd of onlookers that had gathered. VIC/Nguyen said that the subject later identified as ARR/Castro, was the subject who had attacked him. VIC/Nguyen desired that the subject be prosecuted. VIC/Nguyen also signed a medical records release.[.] It should be noted that VIC/Nguyen was approximately 5'5" tall, 110 pounds, and 68 years old. ARR/Castro was approximately 6'0" and 240 pounds."

On June 19, 20219, the WCJ issued the F&O, finding that applicant's claim for workers' compensation benefits in this claim is barred in light of the finding that he was the initial physical aggressor in the confrontation with Sau Nguyen and ordered that applicant take nothing by way of his claim.

DISCUSSION

The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a) & 3202.5.) However, it is defendant's burden to prove by a preponderance of the evidence that applicant's injuries "arise out of an altercation in which the injured employee is the initial physical aggressor" and that accordingly, applicant's claim should be barred. (Lab. Code, §§ 3202.5, 3600(a)(7)). To qualify as arising out of an altercation, "an injury must result from an exchange between two or more persons characterized by an atmosphere of animosity and a willingness to inflict bodily harm." (*Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 719 [37 Cal.Comp.Cases 124, 127]; *Valencia v. Workers' Comp. Appeals Bd.* (1982) 47 Cal.Comp.Cases 36 [writ denied].)

The decisions of the Workers' Compensation Appeals Board must be supported by substantial evidence. (Lab. Code, § 5903; *LeVesque v. Worker's Comp. Appeals Bd.* (1970) 1 Cal.3d. 627, 635-637 [35 Cal.Comp.Cases 16].) While we accord great weight to WCJs' findings on the credibility of witnesses, if they are supported by "ample, credible evidence" or "substantial evidence," we exercise independent judgment as to whether the evidence satisfies the required elements of the applicable law. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500].) Furthermore, the Appeals Board is empowered on reconsideration to resolve conflicts in the evidence, to make its own credibility determinations, and to reject the findings of the WCJ and enter its own findings on the basis of its review of the record. (*Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 908 [55 Cal.Comp.Cases 196].) Based on our review of the record, we disagree with the WCJ's determination that defendant satisfied their burden of proof with "credible evidence" that applicant was the initial physical aggressor.

Specifically, based on our review, we conclude that the police report and the victim's statements contained therein do not serve as substantial evidence that applicant acted as the initial physical aggressor. The Appeals Board is bound to accomplish substantial justice in all cases and

is generally not bound by the common law or statutory rules of evidence. (Lab. Code, § 5708.) Hearsay is often received into evidence in workers' compensation hearings and is routinely relied upon to support findings. (See Lab. Code, § 5703.) In considering whether to rely on hearsay, the WCJ or the Appeals Board must consider whether the hearsay is reliable and whether the opposing party was afforded an adequate opportunity to cross examine the witness. (*Martinez v. Associated Engineering & Construction Co.* (1979) 44 Cal.Comp.Cases 1012, 1019 (Appeals Board en banc).)

While we agree that the hearsay nature of the police report does not necessarily require the exclusion of the report from evidence, we believe that the great weight the WCJ has assigned the police report appears unwarranted. There is no credibility assessment of the statements by the identified victim in the report, no substantiation of the victim's report by any eyewitness, and no subsequent investigation. Most importantly, there was no opportunity for applicant to cross examine either the victim, the author of the statement, or the second officer who assisted in providing a translation of the victim's statement. The statements are not particularly reliable, nor do we find that the evidentiary weight of the police report substantial.

Furthermore, the WCJ conclusions regarding the dismissal of criminal charges arising out of the incident are unsound. He summarized applicant's trial testimony as follows:

He believes he was originally charged with a felony. This was later dropped to misdemeanor within a few days. There was no trial and no plea. The DA eventually dismissed the charges. He is asked why. He responds that the DA had no evidence and no witnesses. They took that into account. They also took into account the protective status of his employment as a maintenance man at the complex.

It took about two years to resolve the criminal case. He had a court appearance every two to three months. It was resolved in approximately 2015.

Originally his attorney wanted him to plead to a lesser crime of disturbing the peace. He refused. He let that attorney go. He was not looking out for his interest. He dismissed his public defender and later hired a private attorney that he dismissed.

He had hired another private attorney that he also had a conflict. He was on a third private attorney when the charges were dismissed. (MOH/SOE I at p. 12, lines 1-19.)

Based on this testimony the WCJ concludes:

[I]t is clear from the attempted criminal prosecution of the Applicant, which went on for two years or so, that the Union City Police Department and the Alameda County DA felt strongly that the Applicant was the aggressor and physically battered Mr. Nguyen without good cause. They would not have charged the case, initially as a felony, and pursued the case as a misdemeanor for many months had the DA not felt they had the evidence to support and prove the elements of such crimes beyond a reasonable doubt. Obviously, that is a much higher standard than the preponderance of the evidence standard used at the WCAB. The fact that after two years charges were dismissed does not in my view exonerate Mr. Castro or imply that he was not the physical aggressor, rather I suspect it was more related to problems with availability of witnesses either in the form and/or availability of Mr. Nguyen and/or the police officers involved in the response and investigation, especially when combined with Mr. Castro's clear intention to litigate such a charge to the bitter end. (Report, p. 9)

We find these inferences drawn by the WCJ based on the mere existence of a prosecution and its subsequent dismissal unreasonable. There are many possible reasons why the prosecution did not go forward, and these theories are mere speculation absent credible evidence. It is well settled that we may not base our determination as to whether defendant met its burden based on an *absence of evidence* or on *speculation* as to why unknown third parties chose or did not choose to take a further action. Instead, our decisions must rely on coherent, reliable evidence.

In this case, defendant called no witnesses and submitted no additional evidence to support how these facts support defendant's claims. Under those circumstances, and based on the record before us, defendant has failed to meet their burden of proving that applicant was the initial physical aggressor.

Based on the medical record, including the reports of the qualified medical evaluator (QME), substantial evidence supports a finding that applicant sustained industrial injury to the low back/tailbone and to the right elbow. (Exhibit 104, QME Report of Dr. James B. Shaw, M.D., dated November 7, 2015, p. 43-44; Exhibit 103, Supplemental QME Report of Dr. Shaw, dated January 9, 2016; Exhibit 102, Re-exam Report of Dr. Shaw, dated June 8, 2017; Exhibit, 101, Final Supplemental QME Report of Dr. Shaw, dated July 28, 2017 9, 2016.) Furthermore, “[t]he parties agree that if the court finds the claim is not barred by the initial physical aggressor defense, defendant stipulates to injury to the low back/tailbone and to the right elbow only, and that there is a need for further medical treatment of those body parts.” (MOH/SOE I, p.2:35-29)

Accordingly, as our Decision After Reconsideration, we rescind the Findings and Order and substitute a new Finding of Facts, and find that applicant sustained injury to the back/tailbone and to the right elbow and defer the issue of injury to any other body parts; that applicant was not the initial physical aggressor and defendant did not meet its burden that applicant's claim is barred by 3600(a)(7); and that applicant is entitled to medical treatment.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the WCJ'S June 19, 2019 Findings and Order is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant Gary Castro, while employed on February 4, 2013, as a maintenance man, by Associations Inc., DBA Massingham & Associates, sustained injury arising out of and occurring in the course of employment to his low back/tailbone and to the right elbow. The issue of injury to other body parts is deferred.
2. At the time of applicant's injury, the employer's workers' compensation insurance carrier was American Zurich Insurance Company.
3. Applicant was not the initial physical aggressor in the confrontation with Sau Nguyen that resulted in his injury, and defendant did not meet its burden to show that applicant's claim for benefits is barred by Labor Code section 3600(a)(7).

4. Applicant is entitled to medical treatment.

WORKERS' COMPENSATION APPEALS BOARD

/s/JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 3, 2025

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

**GARY CASTRO
LAW OFFICES OF JAMES LATIMER
DOUGLAS MCKAY, ESQ.
LAW OFFICES OF THOMAS BURNS
EMPLOYMENT DEVELOPMENT**

LN/md

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