WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KAREN ROBASCIOTTI, *Applicant*

vs.

MAXIM HEALTHCARE SERVICES, INC. aka AMERGIS HEALTHCARE STAFFING, INC.; ACE AMERICAN INSURANCE COMPANY, Administered By ESIS, *Defendants*

Adjudication Number: ADJ12265574
Goleta District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award on S&W Claim of July 29, 2026, wherein it was found that "Applicant has failed to sustain her burden of proof in support of her Labor Code § 4553 Serious and Willful petition and takes no additional benefits pursuant to that petition." Although captioned "Findings and Award" the decision contains no award, but rather contains an order that applicant take nothing by way of her claim for increased section 4553 benefits for the alleged serious and willful misconduct of defendant Maxim Healthcare Services, Inc. (Maxim). Previously in this matter, in a Findings and Award of August 8, 2025, it was found that while employed on January 16, 2019 as a psych tech, applicant sustained industrial injury to her lumbar spine, cervical spine, head, mouth/teeth, cranial nerve, digestive tract, psyche, and in the forms of headaches and speech impairment causing permanent total (100%) disability.

Applicant contends that the WCJ erred in finding that she was not entitled to increased benefits pursuant to Labor Code section 4553 for Maxim's alleged serious and willful misconduct. We have received an Answer from Maxim and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will deny the applicant's Petition.

I.

Petitions for reconsideration filed on or after July 14, 2026 are subject to Labor Code section 5909, which states that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on August 26, 2026 and 60 days from the date of transmission is Sunday, October 25, 2026. The next business day that is 60 days from the date of transmission is Monday, October 26, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, October 26, 2026, so that we have timely acted on the Petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here, according to the proof of service for the Report, the Report was served on August 26, 2026, and the case was transmitted to the Appeals Board on August 26, 2026. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 26. 2026.

II.

Turning to the merits, applicant was employed by Maxim, a medical staffing service that placed health care workers at health care facilities. (Transcript of July 1, 2026 trial at pp. 16-17.) In this case, applicant was placed at Santa Barbara Behavioral Health Services Psychiatric Health Facility (PHF). (Transcript of July 1, 2026 trial at pp. 16-17, 32.) Although the contours of the Maxim-PHF relationship were not fully developed, it appears that Maxim leased workers to PHF and handled administrative tasks such as scheduling and payroll. The PHF facility was staffed by workers who were employees of Maxim as well as employees who were solely employed by PHF, with no relationship to Maxim. (Transcript of July 1, 2026 trial at p. 45.) On the morning of January 16, 2019, applicant sustained industrial injury when she was struck by Adlai Lara, an employee of PHF who was not affiliated with Maxim. (Transcript of July 1, 2026 trial at pp. 44, 83.)

Mr. Lara was the shift supervisor for the nocturnal shift. When applicant began working at PHF, she was sometimes on the nocturnal shift with Mr. Lara as the shift lead. However, applicant testified that around April of 2018 she expressed concerns regarding Mr. Lara to her Maxim scheduler, and at some point requested that she be taken off the nocturnal shift so that she would no longer be on Mr. Lara's team. (Transcript of July 1, 2026 trial at pp. 76-77.) Maxim acceded to the applicant's request, and she was placed on the morning shift which was not supervised by Mr. Lara. (Transcript of July 1, 2026 trial at p. 77.) Nevertheless, applicant still had some contact with Mr. Lara because during the shift change, Mr. Lara would convey information regarding the care of the facility's patients to the morning lead, and this meeting would take place in a room where applicant was also present. (Transcript of July 1, 2026 trial at p. 77.)

Applicant explained that the concerns regarding Mr. Lara that she communicated to Maxim were that he "was starting to escalate as far as unstable, and … he seemed very unpredictable." (Transcript of July 1, 2026 trial at p. 75.) Applicant explained, "Based on my experience from assessing individuals, I could see he was becoming – becoming more agitated, unpredictable, like a patient would be. You know, not much interaction, never – you know, I don't remember him looking me in my eye. You know, I never saw him laughing, smiling. Everything was short. He got in my – I remember him on a couple of occasions getting into my space, which was, you know, kind of boundaries that we set." (Transcript of July 1, 2026 trial at p. 77.)

Nevertheless, applicant admitted that prior to the January 16, 2019 incident, Mr. Lara had never been physically violent with her (Transcript of July 1, 2026 trial at p. 79), had never threatened her (Transcript of July 1, 2026 trial at p. 80), and that was she was unaware of Mr. Lara ever being physically violent with any other employee at the PHF facility (Transcript of July 1, 2026 trial at p. 80). Applicant admitted that Mr. Lara did not give "any indication that he was going to walk up to [her] and smack [her] in the face" and that she was "absolutely" surprised that he did so. (Transcript of July 1, 2026 trial at p. 86.)

The two Maxim representatives that testified at trial both testified that they were unaware of any confrontations or physical altercations involving Mr. Lara prior to applicant's injury. (Transcript of July 1, 2026 trial at pp. 40, 53.) Applicant presented no other evidence of Mr. Lara's violent proclivities.

III.

Labor Code § 4553 states:

> The amount of compensation otherwise recoverable shall be increased one-half, together with costs and expenses not to exceed two hundred fifty dollars ($250), where the employee is injured by reason of the serious and willful misconduct of any of the following:
>
> (a) The employer, or his managing representative.
>
> (b) If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent thereof.
>
> (c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof.

Johns-Manville Sales Corp. v. Workers' Comp. Appeals Bd. (Horenberger) (1979) 96 Cal.App.3d 923, 930-931 [44 Cal.Comp.Cases 878] contains an in-depth discussion of the significant findings necessary to impose "serious and willful" liability. The *Horenberger* court explained that:

> [W]illful misconduct has a well-established meaning which is clearly differentiated from negligence and gross negligence. [Citations.] Gross negligence involves a failure to act under circumstances that indicate a passive and indifferent attitude toward the welfare of others. Negative in nature, it implies an absence of care. [Citations.] Willful misconduct, on the other hand, requires an intentional act or an intentional failure to act, either with knowledge

> that serious injury is a probable result, or with a positive and active disregard for the consequences. [Citations.]

In *Mercer-Fraser Co. v. Industrial Acc. Com. (Soden)* (1953) 40 Cal.2d 102, 117 [18 Cal.Comp.Cases 3], the Supreme Court explained that "'Willful misconduct' means something different from and more than negligence, however gross. The term "serious and willful misconduct" is described … as being something "much more than mere negligence, or even gross or culpable negligence" and as involving "conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences" … The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence.'" (Quoting *Porter v. Hofman* (1938) 12 Cal.2d 445, 448.)

In *Hawaiian Pineapple Co. v. Ind. Acc. Com. (Churchill)* (1953) 40 Cal.2d 656, 663-664 [18 Cal.Comp.Cases 94], the Supreme Court held that "A 'reckless disregard' of the safety of employees is not sufficient in itself unless the evidence shows that the disregard was more culpable than a careless or even a grossly careless omission or act. It must be an affirmative and knowing disregard of the consequences. … the employer [must have] knowledge of the consequences of its act or omission necessary to make the performance of that act or omission a willful one."

The *Horenberger* court noted that:

> The basis for serious and willful misconduct has been aptly summarized as including three alternatives: '(a) a deliberate act for the purpose of injuring another; (b) an intentional act with knowledge that serious injury is a probable result; or (c) an intentional act with a positive and reckless disregard of its possible consequences.' [Citations.] It follows that an employer guilty of serious and willful misconduct must know of the dangerous condition, know that the probable consequences of its continuance will involve serious injury to an employee, and deliberately fail to take corrective action. [Citations.]

(*Horenberger*, 96 Cal.App.3d at p. 933.)

> "While the line between gross negligence and wilful misconduct may not always be easy to draw, a distinction appears … in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while wilful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the [L]egislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to

> misconduct as distinguished from negligence and that this misconduct must be wilful. While the word 'wilful' implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But wilful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Wilful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result."

(*Mercer-Fraser, supra*, 40 Cal.2d at p. 118, quoting *Meek v. Fowler* (1935) 3 Cal.2d 420, 425–426 [45 P.2d 194].)

Finally, even if the applicant can prove these elements, they must also prove that the conduct "was the proximate cause of h[is] injury." (*Horenberger*, 96 Cal.App.3d at p. 934.)

In this case, it is not clear what applicant is alleging was willful misconduct on the part of Maxim that proximately caused applicant's injury. There was no evidence presented that Maxim committed any willful act towards the applicant. Applicant requested that she be taken off Mr. Lara's team, and this request was granted by Maxim. No evidence was presented that anyone was aware of any dangerous condition that would probably lead to serious injury and that Maxim intentionally failed to take action. No evidence was presented that applicant complained of Mr. Lara after the shift change, and it is not clear what corrective action Maxim could have instituted in any case, as Maxim had no supervisory oversight over PHF employees. (Transcript of July 1, 2026 trial at pp. 42-43.)

Although it unfortunately appears that applicant was unusually prescient regarding Mr. Lara, applicant has simply not carried the stringent burden of any willful act or omission on behalf of Maxim.

IV.

Labor Code section 4553.1 states:

> In order to support a holding of serious and willful misconduct by an employer based upon violation of a safety order, the appeals board must specifically find all of the following:
>
> (1) The specific manner in which the order was violated.
>
> (2) That the violation of the safety order did proximately cause the injury or

> death, and the specific manner in which the violation constituted the proximate cause.
>
> (3) That the safety order, and the conditions making the safety order applicable, were known to, and violated by, a particular named person, either the employer, or a representative designated by Section 4553, or that the condition making the safety order applicable was obvious, created a probability of serious injury, and that the failure of the employer, or a representative designated by Section 4553, to correct the condition constituted a reckless disregard for the probable consequences.

It is unclear whether applicant is attempting to impose liability based on section 4553.1. Although the Petition for Reconsideration cites general industry safety orders regarding the need for an employer to establish a workplace violence prevention program, no evidence or discussion of the elements of section 4553.1 liability was offered at trial or in the Petition . No evidence or explanation was presented regarding the specific manner in which any general order was violated, whether the breach was the proximate cause of the injury, and whether the safety order was known to Maxim. We have perused the transcript of the July 1, 2026 trial and no questions at all were asked regarding any safety orders, nor was any other evidence presented on the issue.

Since applicant has not carried her burden of showing that she was injured as a result of any "willful" conduct on behalf of Maxim, we will deny her Petition.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Award on S&W Claim of July 29, 2026 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG L. SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 26, 2026

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

KAREN ROBASCIOTTI
LAW OFFICES OF ALAN H. FENTON
THOMPSON COBURN LLP

DW/bp

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