

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. LBO 155943

BILL ALBRIGHT,*Applicant,**vs.***PROCTOR & GAMBLE
MANUFACTURING CO.,***Defendants,***DECISION
AFTER
RECONSIDERATION**

On June 20, 1991, the Board granted reconsideration of its Decision After Reconsideration issued on April 12, 1991, in order to further study the issues raised by petitions for reconsideration filed by defendant, Proctor & Gamble Manufacturing Company, and applicant, Bill Albright. In our April 12, 1991 decision, we rescinded the August 28, 1989 Findings and Order of the workers' compensation judge (WCJ) and found that the industrial injuries sustained by applicant on February 10, 1986 were caused by the serious and willful misconduct of defendant.

In seeking reconsideration, defendant contends that the decision of the Board is not justified by substantial evidence, and further that the Board failed to adequately detail the evidence supporting the finding of serious and willful misconduct. Applicant, by letter petition, seeks a recalculation of the award and an increase in attorney's fees.

Based upon our review of the record, and for the reasons more fully explained below, we agree with the arguments raised by defendant that the evidence is not sufficient to justify the finding of serious and willful misconduct.

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1 We shall therefore reinstate the original August 28, 1989 Findings and Order of
2 the WCJ, previously rescinded.

3 Statement of the Case

4 Applicant suffered a stipulated industrial injury to his spine and right
5 major arm causing 100% permanent disability on February 10, 1986, when he fell
6 through a hole in the floor at his place of employment. A hearing was held on
7 March 14, 1989, on the applicant's petition for additional benefits under Labor
8 Code Sections 4553 and 4553.1, for defendant's serious and willful misconduct for
9 violating General Industry Safety Order 3212(a), which applicant contended
10 proximately caused his injury.

11 The WCJ issued his Findings and Award, and a separate Finding and
12 Order on Serious and Willful Misconduct Only, on August 28, 1989. In the latter
13 order, the WCJ found the injury was not proximately caused by the serious and
14 willful misconduct of the employer and ordered applicant take nothing by reason
15 of his petition for additional benefits.

16 Applicant sought reconsideration from this determination, contending that
17 the evidence justified a finding that the injury was the proximate result of the
18 defendant's serious and willful misconduct, evidenced by the violation of Safety
19 Order 3212(a). The WCJ re-analyzed the evidence and recommended that the
20 petition be granted and his determination be reversed. We granted
21 reconsideration to allow for further study of the issues raised. On April 12, 1991,
22 we issued our decision after reconsideration and found that the evidence justified
23 a finding that applicant's injuries were proximately caused by the defendant's
24 serious and willful misconduct.

25 Applicant, by letter petition, raised an issue of the appropriate amount of
26 increased benefits owing and appropriate attorney's fees. Defendant filed a

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1 petition for reconsideration, asserting that the evidence did not justify the decision
2 to reverse the original finding and order.

3 Statement of Facts

4 Applicant's injury occurred when, while employed as a stationary engineer
5 tending a boiler on the graveyard shift, he fell through a hole, approximately 3' x
6 4', cut in the cement floor. The hole had been cut several years earlier to allow for
7 the removal of equipment from the building. A cover made of plywood had been
8 installed over the hole. The dimensions of the 3/4' plywood cover allowed for three
9 to six inches of overlap over the edge of the hole. Two 2x4 pieces of wood had been
10 nailed in a parallel manner to the underside of the long side of the plywood board
11 with the two inch side projecting down to hold the board in place. The placement
12 of the 2x4's allowed the plywood cover to only move approximately one half inch in
13 any direction. At the time of the accident, only one of the 2x4s was attached, and
14 no evidence was presented to explain what happened to the other piece.

15 Applicant testified that the accident happened when he went to the room
16 where the hole was to check on a cold draft that was blowing making it cold where
17 he was working. There was a window beyond the hole in the floor and a table to
18 the left of the hole. Though he was aware of the hole, he was not thinking about it
19 that night. He had always seen the hole covered except for when the equipment
20 was being taken out through it. He does not recall falling through the hole.

21 Joseph Hower, the utilities manager for defendant, testified that after the
22 accident, he replaced the cover over the hole and tried to dislodge it by kicking it.
23 The plywood was placed in the hole the way he had found it, with the remaining
24 2x4 on the edge closest to the wall. He kicked it several times from the direction it
25 would be approached from, but he could not move it. Hower testified that a table
26 had been placed over the hole for a long time that had been used by insulation
27 cutters, but he did not know when the table had been removed.

1 Subsequent to the accident, an investigation was conducted by Cal-OSHA,
2 which issued a citation for a serious violation of Safety Order 3212(a). The
3 description of the violation in the citation was "[t]he floor opening cover being used
4 on 2/10/86 didn't effectively guard the floor opening which resulted in a serious
5 accident to an employee." (App. Exh. 1.) Defendant was fined \$300 for the
6 violation.

7 Discussion

8 In order to find an employer guilty of serious and willful misconduct based
9 upon the violation of a safety order, pursuant to Labor Code Sections 4553 and
10 4553.1, the Board must specifically find all of the following:

11 (1) The specific manner in which the order was violated.

12 (2) That the violation of the safety order did proximately
13 cause the injury or death, and the specific manner in
14 which the violation constituted the proximate cause.

15 (3) That the safety order, and the conditions making the
16 safety order applicable, were known to, and violated by, a
17 particular named person, either the employer, or a
18 representative designated by Section 4553, or that the
19 condition making the safety order applicable was
20 obvious, created a probability of serious injury, and that
21 the failure of the employer, or a representative
22 designated by Section 4553, to correct the condition
23 constituted reckless disregard for the probable
24 consequences.

25 The WCJ took judicial notice of General Industrial Safety Order Number
26 3212, which provides for the protection of floor openings. The safety order, in
27 pertinent part, requires:

28 "(a)(1) Every floor opening shall be guarded by a cover, a
29 guardrail or equivalent on all open sides (except at
30 entrance to stairway or ladder way). Toeboards shall be
31 installed around the edges at permanent floor openings
32 where persons may pass below the opening. While the
33 cover is not in place, the floor opening shall be constantly
34 attended by someone or shall be protected by guardrails.

35 ...

1 (5)(C) The construction of floor opening covers may be of
2 any material that meets the strength requirements.
3 Covers projecting not more than 1-inch above the floor
4 level may be used providing all edges are chamfered to
5 an angle with the horizontal of not over 30 degrees.

6 In finding the applicant's injury to have been proximately caused by
7 defendant's serious and willful misconduct in our April 12, 1991 Decision After
8 Reconsideration, we relied upon the reasons stated by the WCJ in his Report and
9 Recommendation on Petition for Reconsideration, and upon the fact that the cover
10 was not adequately constructed to avoid accidental movement and that there was
11 ample evidence of the defendant's knowledge of the manner in which the hole
12 cover was constructed.

13 The WCJ's reasoning that a violation of the safety order was responsible for
14 the injury, justifying a finding that the elements of section 4553.1 had been met,
15 was as follows:

16 "If it is assumed that the cover was in place just
17 prior to the accident, and it is assumed that one of the
18 parallel 2x4's attached to the bottom of the cover,
19 (intended to keep the cover in place) had somehow
20 disappeared prior to the applicant's fall and if it is
21 assumed applicant did not remove the cover then the
22 cover must have in some manner dislodged itself from
23 the hole while the applicant was progressing toward the
24 window located in the wall beyond the hole, on line with
25 the direction applicant was progressing.

26 "If applicant stubbed his toe or foot on the edge of
27 the cover as he walked toward the window, it is
conceivable that the cover could have moved forward as
one of the 2x4's to keep it in place was missing. The
cover, then dislodged, would no longer act as a barrier
from applicant passing through the hole to the surface
below.

"There is no evidence that the cover as constructed
had edges that were chamfered to an angle with the
horizontal of not over 30 degrees. There is no evidence as
to what the angle of chamfer, if any, was. The cover in
use at the time was missing. A cover supposedly
similar to the one in use at the time of the accident was
present in the court room but was not introduced in
evidence by either party. It appeared to be an ordinary

1 piece of 4x8 3/4" plywood. If this was the fact none of the
 2 edges would have been chamfered. It would be a
 3 reasonable inference to draw that had the edge of the
 4 cover been chamfered or beveled as required a persons
 5 foot while walking would have glided or slid over the
 6 cover rather than striking the edge and dislodging it.
 7 On reconsideration I am now of the opinion that this is
 8 most probably what occurred. Applicant while walking
 9 to cover the open window struck with his foot the edge of
 10 the cover. The cover, because of a lack of suitable means
 11 of securing it in place (i.e. the missing 2x4) dislodged
 12 and applicant fell.

13 "The lack of compliance with the safety order
 14 relative to chamfer therefore does become the proximate
 15 cause of the accident.

16 "There is ample evidence that management knew
 17 of the existence of the hole and the manner in which it
 18 was covered among these being Mr. Phillips the
 19 manager of the Boiler Room, Mike Grant the supervisor
 20 of John Clark the carpenter/rigger who on Grant's
 21 instruction constructed the cover."

22 (Report and Recommendation on Petition for
 23 Reconsideration, 10/5/89, p. 3-4.)

24 In order to establish a serious and willful misconduct, in violation of
 25 section 4553,

26 "It follows that an employer guilty of serious and willful
 27 misconduct must know of the dangerous condition,
 28 know that the probable consequences of its continuance
 29 will involve serious injury to an employee, and
 30 deliberately fail to take corrective action."

31 (*Johns-Manville Sales Corp. v. Workers' Comp. Appeals*
 32 *Bd. (Horenberger)* (1979) 96 Cal.App.3d 923 [44
 33 Cal.Comp.Cases 878])

34 Pursuant to *Mercer-Fraser Company v. I.A.C. (Soden)* (1953) 40 Cal.2d 102
 35 (18 Cal.Comp.Cases 3, 11), moreover, the legal standard governing serious and
 36 willful misconduct is quite stringent:

37 "The term 'serious and wilful (sic) misconduct' is
 38 described ... as being something 'much more than mere
 39 negligence, or even gross or culpable negligence' and as
 40 involving 'conduct of a quasi criminal nature, the
 41 intentional doing of something either with the
 42 knowledge that it is likely to result in serious injury, or

1 with a wanton and reckless disregard of its possible
2 consequences'." (Emphasis in original.)

3 Pursuant to *Johns Manville Sales Corporation v. Workers' Comp. Appeals*
4 *Bd. (Horenberger)* (1979) 96 Cal.App.3d 923 [44 Cal.Comp.Cases 878, 884],
5 moreover, defendant employer's continued reliance on warning cones to advise of
6 wet, greasy, and/or slippery floors rather than replacement of the floor surface
7 with a new floor does not warrant a finding of serious and willful misconduct. In
8 *Horenberger, supra*, the Court of Appeal reversed a WCJ's finding of serious and
9 willful misconduct, stating:

10 "Apparently, the workers' compensation judge adopted
11 the theory that every continuing failure to furnish a safe
12 place to work by correcting a known defect amounts to
13 serious and willful misconduct on the part of the
14 employer. (Lab. Code §§ 6400-6404.) We agree that such
15 a theory would be appropriate in instances of a known
16 defect possessing the potentiality for serious and deadly
17 harm, such as continued leakage of explosive gas,
18 instability in the foundations of a building, sagging high
19 tension wires, or storage of highly inflammable
20 materials in a theater basement. Failure to correct such
21 defects on discovery is the type of massive failure that
22 qualifies as a quasi-criminal conduct and can justify an
23 increased award for serious and willful misconduct.
24 But not every failure to correct known defects in the
25 workplace amounts to serious and willful misconduct.
26 Were such the law, the distinction between negligence
27 and willful misconduct in workers' compensation law
would largely disappear." (*Id.*)

22 After extensive review of the facts and record in this matter, we cannot
23 conclude that there is sufficient evidence to justify the findings required by section
24 4553.1 to establish either the violation of the safety order or that such a violation
25 was the proximate cause of applicant's injury.

26 The relevant aspect of the safety order was the requirement for a chamfered
27 edge on the cover. The evidence presented by the party with the burden of

1 establishing the violation as to whether or not the cover had chamfered edges was
2 not conclusive or compelling. The deposition testimony of the carpenter who
3 constructed the original cover, John Clark, does not answer this question. He
4 was never asked whether the edges were chamfered. As the actual cover was not
5 available for examination, there was no evidence to establish the violation.

6 The WCJ, in the Report upon which we previously relied in finding a
7 violation, based his conclusion upon unsupported assumptions as to how the
8 cover became dislodged. He concluded that the applicant must have kicked the
9 cover out of place due to the missing 2x4 and then fell through the hole. But there
10 was no direct evidence available as to the mechanics of the injury, as applicant
11 could not recall the details of the incident. Evidence offered by others who came
12 upon the scene after the incident described the location of the cover and the 2x4
13 blocking as being on the same side as the farthest edge of the hole. Thus the
14 blocking would have been in place to prevent the board from sliding if kicked.
15 Additionally, there was testimony from Mr. Hower that he unsuccessfully
16 attempted to dislodge the cover in the same manner which the WCJ assumed the
17 applicant had done.

18 Thus, there is insufficient evidence to justify a finding that there was a
19 violation of a safety order and that the violation was the proximate cause of the
20 injury.

21 Finally, there is insufficient evidence to find knowledge of the condition
22 constituting a violation of the safety order by the employer or a named
23 representative and a conscious failure to correct the violation. There was no
24 testimony that the employer was aware that the cover as constructed was in
25 violation of the safety order or that the condition as it existed presented a
26 probability of serious injury. Further, there was no evidence that the employer or
27 any named representative knew of the change in the cover, the loss of one of the

1 2x4 blocks, which made the cover less secure. The WCJ found evidence that
 2 management knew of the existence of the hole and the manner in which it was
 3 covered. But this is not akin to knowledge of the existence of a dangerous
 4 condition which required further corrective action. The cover as constructed was
 5 believed to have provided adequate protection. Thus there is insufficient evidence
 6 to establish the requisite degree of knowledge akin to quasi-criminal conduct. The
 7 decision to place a plywood cover over the hole in a manner which led to the
 8 potential for such a serious injury could be found to be grossly negligent, but this
 9 does not support a finding that the defendant's acts were serious and willful in
 10 violation of Labor Code section 4553.

11 We shall therefore, as our Decision After Reconsideration, rescind our
 12 previous Opinion and Decision After Reconsideration, dated April 12, 1991, and
 13 reinstate the Finding and Order on Serious and Willful Misconduct, dated August
 14 28, 1989.

15 In view of this outcome, we shall deny applicant's petition for a
 16 recalculation of the award.

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For the foregoing reasons,

IT IS ORDERED that the Opinion and Decision After Reconsideration, dated April 12, 1991, be, and hereby is, RESCINDED, and the August 28, 1989 Findings and Order on Serious and Willful Misconduct is REINSTATED as the decision of the Board.

IT IS FURTHER ORDERED that the applicant's Petition for Reconsideration is DENIED.

WORKERS' COMPENSATION APPEALS BOARD

Jack Margison

I CONCUR,

[Signature] DEPUTY
~~NOT PARTICIPATING~~
Dennis J. Harrison DEPUTY



DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

MAR 11 1993

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD EXCEPT LIEN CLAIMANTS.

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