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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

C.C. MYERS, INC.,
Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD and
BRUCE LOCKWOOD,

Respondents.

C067528

(WCAB No. SAC367325)

Labor Code section 4553 (hereafter section 4553) provides for a 50 percent increase in the workers' compensation recovery of an injured worker in the event the injury was caused by serious and willful misconduct of the employer. In this matter, respondent Bruce Lockwood (Claimant) was injured while working for petitioner C.C. Myers, Inc. (Employer) when a co-worker drove an excavator over Claimant's foot. Respondent Workers' Compensation Appeals Board (the Board) concluded Employer's failure to provide a "spotter" to help direct the movement of

the excavator, under the surrounding circumstances, amounted to serious and willful misconduct. Employer filed a petition for review with this court, asserting the Board's determination is not supported by substantial evidence. We disagree with Employer and affirm the award.

FACTS AND PROCEEDINGS

Because the only issue presented in this matter is whether Employer's failure to provide a spotter for the excavator at the time of Claimant's injury amounted to serious and willful misconduct, we discuss only those facts relevant to that issue.

The injury occurred at a construction site near the intersection of Highway 50 and White Rock Road in Sacramento County, where Employer was engaged in the construction of a bridge linking the eastbound and westbound lanes of Highway 50 for future widening of that roadway.

On August 14, 2001, at approximately 7:30 p.m., Claimant and three others were engaged in placing steel shoring plates along the walls of a hole that had earlier been excavated at the worksite. The shoring plates, weighing approximately 850 pounds, were being moved from a stack to the holes using an excavator with its bucket removed. The driver of the excavator, Steve Barba, would drive to the stack where another employee, Brian Lussier, attached a plate to the excavator and signaled Barba that the plate was ready to move. Barba would then lift the plate, back the excavator toward the hole and swing the cab of the excavator around to position the plate near the hole.

The foreman on the jobsite, Kenneth Barth, stood near the hole and assisted Barba in positioning the plates between vertical I beams already installed in the holes. Later in the day, Claimant assisted Barth in this effort. This process was repeated many times as each plate was installed in the hole, with the excavator moving along a consistent path from the stack of plates to the hole.

The normal work shift for the crew at the jobsite was 6:00 a.m. to 2:30 p.m. However, the crew had been held over to complete the installation of the plates in preparation for another crew to install rebar in the holes the next day. At the time of the accident, the crew had been on the job for 13 and one-half hours and it was starting to get dark.

Just before the accident, Barba obtained a plate from Lussier, and Claimant and Barth were standing near the hole waiting for Barba to bring the plate over. Barth was facing the excavator and had his back to Claimant. Unknown to Barth, Claimant had kneeled down to push a rock into the hole. As he did so, the excavator began moving backward to bring the plate to them. Barth did not look around to make sure the way was clear for the excavator to approach.

According to Claimant, as the excavator moved backward, it slid sideways off its normal path, thereby bringing it closer to the edge of the hole. On this trajectory, it ran over Claimant's foot. According to Lussier, who was watching from the stack of plates, the excavator did not deviate from its normal path. Instead, when Claimant kneeled down, he placed his

leg in the normal path of the excavator. Lussier testified that, when he saw this, he began yelling at Barba to stop and even threw his hammer at the excavator to get Barba's attention. Barth, too, testified the excavator did not deviate from its normal path.

The excavator was equipped with a horn and backup alarm that were working on the day of the injury. Barth testified that, just prior to the injury, he heard the backup alarm. Lussier likewise testified he heard the horn and backup alarm each time the excavator moved. However, Claimant testified there was a lot of noise at the time from the traffic overhead and the machine itself and he did not remember hearing the alarm prior to the injury.

The track of the excavator rolled over Claimant's foot, slicing off the bottom of it. The resulting injury was so severe that Claimant's leg had to be amputated below the knee.

Claimant filed a workers' compensation claim and received a stipulated award of temporary disability benefits in the amount of \$490 per week from August 14, 2001 to March 11, 2002, and from April 22, 2002 to May 23, 2002. He also received an award of permanent disability benefits in the amount of \$170 per week, for a total of \$58,862.50.

Claimant filed a petition for increased benefits based on serious and willful misconduct. He alleged various acts of Employer amounted to such misconduct, including not having a spotter on hand for the excavator, allowing Barba to use his

cell phone while operating the excavator, using the excavator as a crane, and failing to have adequate first aid at the jobsite.

At the hearing on his petition, Claimant testified that a spotter functions as a second set of eyes for the excavator operator and makes sure it is safe for the excavator to move. He further testified that he has worked around heavy equipment since 1973 and has used spotters and seen spotters used with excavators and cranes. According to Claimant, if a spotter had been on hand, he would have stopped the excavator before it drove over Claimant's foot.

James Jacobs, a union business representative, testified that a spotter is needed because the operator of an excavator cannot see all around him. According to Jacobs, the spotter maintains eye contact with the operator and uses hand signals to indicate whether it is safe to proceed. Jacobs further testified that, in this type of job, it is standard industry practice to use a spotter.

The workers' compensation judge (WCJ) initially rejected Claimant's request for increased benefits, finding no serious and willful misconduct. Regarding the lack of a spotter, the WCJ explained that since Barth alone had been tasked with placing the plates in the hole, and Claimant had joined him voluntarily, "[t]here is no evidence that a need for a spotter would have been anticipated in advance"

Claimant filed a petition for reconsideration. In her Report and Recommendation on Petition for Reconsideration, the WCJ reversed herself and concluded Employer had engaged in

serious and willful misconduct. However, the basis for that finding was not the failure to provide a spotter.

In its Opinion and Order Granting Reconsideration and Decision after Reconsideration, the Board agreed with the WCJ that there had been serious and willful misconduct. However, the Board rejected the WCJ's rationale and concluded instead that the misconduct was the failure to provide a spotter alone. The Board indicated that, under the circumstances presented, "use of a spotter . . . was part of the employer's duty to provide a safe place to work." According to the Board:

"[F]oreman Barth was on site so he actually knew of the dangerous condition involving the lack of a spotter. In addition, [Claimant's] testimony and that of Mr. Jacobs shows that the need to use a spotter in the vicinity of an excavator was the usual practice, so this employer knew that the probable consequences of the dangerous condition's continued existence would be serious injury to the [Claimant]. [Claimant's] testimony also shows that the crew was pressing to get the job done before the next day when ironworkers would start, which supports an inference that the employer deliberately or intentionally failed to take appropriate corrective action or acted with act [*sic*] with a positive and reckless disregard of the possible consequences. [Citation.] Similarly, it is reasonable to infer that, had a spotter been present, [Claimant] would not have been run over by the excavator. This establishes that the lack of a spotter proximately caused [Claimant's] injury.

"We disagree with the analysis in the WCJ's Opinion on Decision that the need for a spotter could not have been anticipated because [Claimant] was working elsewhere and spontaneously went to Mr. Barth's site to help, which was not requested by Mr. Barth. As noted above, union representative Jacobs testified that if there is a man in the excavator and a man on the ground, a spotter is safer because he can stop the excavator from running over the man on the ground. It follows from this testimony that there should have been a spotter not only for [Claimant], but for Mr. Barth and Mr. Lussier as well.

"In its answer, defendant argues that a spotter was not necessary because the excavator had a backup alarm and also the operator beeped his horn upon backing up. However, [Claimant] testified that if there was an alarm, there was too much ambient noise around for him to hear it. [Citation.]

"On this issue, we note that the excavator falls within CalOSHA Safety Order 1592, subdivisions (b) and (c) which, when read together, require an audible backup alarm plus a manually operated warning device that can be clearly heard from a distance of 200 feet. However, subparagraph (b)(3)(A) provides that in lieu of either of those devices, administrative controls shall be established such as a spotter or flagger in clear view of the operator who shall direct the backing operation. [Citation.] Based on [Claimant's] testimony, it appears that he couldn't hear the automatic backup alarm or the manually operated warning even though he was within a few feet of the vehicle. Therefore, although we do not base our finding of S&W

misconduct on violation of CalOSHA Safety Order 1592, we do conclude that subdivision (b) (3) (A) is another indication, in addition to the testimony cited above, that a spotter was necessary to provide a safe place to work in this instance.” (Fn. omitted.)

Employer filed its own petition for reconsideration. The Board granted reconsideration but ultimately affirmed its decision.

Employer filed a petition for review with this court and, on April 21, 2011, we granted review.

DISCUSSION

I

Serious and Willful Misconduct

Appellate review of a Board decision is limited to the question whether, under applicable principles of law, the Board’s conclusions are supported by substantial evidence in light of the entire record. (*Kerley v. Workers’ Comp. App. Bd.* (1971) 4 Cal.3d 223, 226; *Mote v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 902, 909.) We are not free to look at the record and decide whether we agree with the conclusions reached by the Board majority. In other words, we do not “reweigh the evidence or decide disputed questions of fact.” (*Western Growers Ins. Co. v. Workers’ Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233.) On the other hand, we are “not bound to accept the [Board]’s factual findings if determined to be

unreasonable, illogical, improbable or inequitable when viewed in light of the overall statutory scheme." (*Ibid.*)

As framed by the parties and the decision of the Board, the issue presented is whether, under the circumstances existing at the time of the injury, Employer's failure to have a spotter on hand to work with the excavator operator amounted to serious and willful misconduct within the meaning of section 4553. On appeal from the Board's affirmative finding on that issue, we must determine whether the Board's conclusion is supported by those findings of fact made by the Board that are both supported by substantial evidence and not "unreasonable, illogical, improbable or inequitable when viewed in light of the overall statutory scheme." (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.*, *supra*, 16 Cal.App.4th at p. 233.)

We begin by identifying the applicable legal standard for serious and willful misconduct. This is a question of law we determine de novo. (*Rogers Materials Co. v. Ind. Acc. Com.* (1965) 63 Cal.2d 717, 721 (*Rogers Materials*), disapproved on other grounds in *LeVesque v. Workers' Comp. App. Bd.* (1970) 1 Cal.3d 627, 636-637.)

The leading decision on what constitutes serious and willful misconduct is *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d 102 (*Mercer-Fraser*). In that case, a building under construction collapsed, killing two workers. The Industrial Accident Commission found serious and willful misconduct by the employer, but the Supreme Court annulled the decision. The court found that, while the evidence presented

could support a finding of serious and willful misconduct, the Commission had applied the wrong legal standard in this regard. (*Id.* at pp. 121, 124-125.)

The high court defined the applicable legal standard as follows: “The term “serious and wilful 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.” . . . To constitute “wilful misconduct” there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury” (*Mercer-Fraser, supra*, 40 Cal.2d at p. 117, quoting *Porter v. Hofman* (1938) 12 Cal.2d 445, 447-448.)

The high court continued: “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. . . . 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.) According to the court: "[T]he true rule is that serious and wilful misconduct is basically the antithesis of negligence, and that the two types of behavior are mutually exclusive; an act which is merely negligent and consequently devoid of either an intention to do harm or of knowledge or appreciation of the fact that danger is likely to result therefrom cannot at the same time constitute wilful misconduct; conversely an act deliberately done for the express purpose of injuring another, or intentionally performed either with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless and absolute disregard of its possibly damaging consequences, cannot properly be classed as the less culpable conduct which is termed negligence." (*Id.* at p. 120.)

In a companion case, *Hawaiian Pineapple Co. v. Ind. Acc. Com.* (1953) 40 Cal.2d 656 (*Hawaiian Pineapple*), a forklift driver was injured when a train struck his forklift as he was driving back and forth across the railway tracks, which ran between the employer's main plant and a warehouse. The employer took a number of precautions to avoid accidents at the crossing, including a stop sign, blinking lights warning of approaching trains, and a mirror in the warehouse doorway that reflected the tracks. The employer also repeatedly warned employees of the danger in crossing the tracks. However, there was also evidence

the employer knew drivers customarily failed to stop because of their workloads. (*Id.* at pp. 658-660.)

The Supreme Court found no serious and willful misconduct under these circumstances. Regarding the applicable legal standard, the court explained: "[T]he conduct must be with knowledge of the peril to be apprehended, or done with a positive and active disregard of the consequences. 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. Likewise, a finding that the 'employer knew or should have known had he put his mind to it' does not constitute a finding that the employer had that degree of knowledge of the consequences of his act that would make his conduct wilful. The standard requires an act or omission to which the employer *has* 'put his mind.'" (*Hawaiian Pineapple, supra*, 40 Cal.2d at p. 663.)

In *Keeley v. Industrial Acc. Com.* (1961) 55 Cal.2d 261 (*Keeley*), the employee was engaged in transporting rice from the field to trucks in a "bankout wagon" pulled by a tractor. The unloading operation involved the use of two screw-type augers run by a gasoline engine on the bankout wagon. The tank containing the rice would be opened and the rice would fall into a horizontal auger running along the bottom of the wagon. This auger moved the rice to the rear of the wagon and into a vertical auger which moved the rice up into the truck. (*Id.* at

pp. 263-264.) At one point, the augers jammed and stopped the bankout motor. The foreman on the job came, opened a trap door to the auger and began clearing out the rice by hand. When the foreman was called away on another matter, he instructed the employee to continue clearing out the auger by hand and departed. About 10 minutes later, the foreman returned and restarted the bankout motor. The employee, who was still in the process of clearing out the auger, was injured. (*Id.* at p. 264.) At the time, the foreman knew it would be dangerous for anyone to put their hands into the auger while it is moving. (*Id.* at p. 265.)

The Supreme Court upheld a finding of serious and willful misconduct under these circumstances based on the foreman's actions in ordering the employee into a position of known danger and then leaving the area without taking any precautions to protect him. (*Keeley, supra*, 55 Cal.2d at pp. 269-270.) The court explained: "*While forgetfulness of a known danger alone under some circumstances may constitute only negligence, in the present case there was more than inattention. The sending of an employee into, under or near machinery which, if it moves, will injure him, without providing some means of protecting such employee other than the memory of the foreman when starting the machinery, he being in a position where he could not observe the peril of the employee, was in and of itself sufficient to warrant a finding of wilful misconduct by the commission.*" (*Id.* at pp. 266-267, quoting *Henry J. Kaiser Co. v. Industrial*

Acc. Com. (1947) 81 Cal.App.2d 818, 829, italics added by Keeley.)

Of significance in *Keeley* is that the court did not find serious and willful misconduct based on the conduct of the foreman in forgetting the employee was working in the auger and restarting the bankout motor, which would have been at most negligence or gross negligence. Instead, the court based its finding on the fact the foreman placed the employee in a position of known danger and then took no precautions against injury that could occur if someone like himself started the motor without realizing the employee was present.

In *Rogers Materials, supra*, 63 Cal.2d 717, the employee fell and injured his leg and back when his pant leg caught in a moving chain on a concrete mixer. The employee had been standing on a small platform behind the truck cab, leaning over the rotating drum in an effort to clean off excess concrete. (*Id.* at p. 719.) When the drum revolved, the unguarded chain had a tendency to stretch and flap and an employee attempting to clean the drum would have to lean over, thereby bringing his legs in close proximity to the revolving chain. (*Id.* at pp. 719-720.) The employer's superintendent repeatedly saw the employee on the platform while the drum was rotating and merely warned him to be careful. (*Id.* at p. 723.)

In finding serious and willful misconduct under these circumstances, the high court concluded the employer knew its employee was in a position of danger but failed to take precautionary action. According to the court: "Under these

circumstances, we believe a finding that the employer was guilty of serious and wilful misconduct was justified on the ground that its failure to provide a guard over the chain at the level of the platform or to otherwise protect [the employee] from harm while he was performing his duties there constitutes a deliberate omission to act, with knowledge or appreciation of the fact that [the employee] would probably be injured by its omission." (*Rogers Materials, supra*, 63 Cal.2d at p. 724.)

In the present matter, Employer does not dispute that Barth was its managing representative for purposes of section 4553 liability. Employer instead takes issue with the Board's determination that Barth engaged in serious and willful misconduct. In particular, Employer contends there is no evidence Barth turned his mind to the particular danger posed to Claimant from operation of the excavator. However, before addressing this issue, we consider certain related arguments raised by Employer.

Employer contends the Board failed to consider the entire record of proceedings before the WCJ in reaching its decision. Employer cites the following statement in the Board's initial decision: "The claim proceeded to trial on January 26, 2010. Testimony was received from [Claimant], his wife, and two other witnesses. The first was James Jacobs The second was Kenneth Barth." Employer points out that the foregoing reflects only the first day of testimony, whereas the trial was conducted over two days. Employer's defense was not presented until the second day, with several more witnesses as well as the cross-

examination of Barth. Employer argues any conclusions reached by the Board are therefore not based on a review of the entire record. Implicitly, Employer argues those conclusions are therefore not entitled to deference.

Employer failed to raise this issue below in its petition for reconsideration. It has therefore been forfeited for purposes of review. (Labor Code, § 5904; *Cedillo v. W.C.A.B.* (1971) 5 Cal.3d 450, 456; *U.S. Auto Stores v. W.C.A.B.* (1971) 4 Cal.3d 469, 476-477.) At any rate, there is nothing in the Board's decision after reconsideration to suggest it had not, at least by then, considered the entire record. Absent a contrary showing, we assume official duty has been regularly performed. (Evid. Code, § 664; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1486; *People v. Young* (1991) 228 Cal.App.3d 171, 186.)

Employer next contends the Board misrepresented the evidence in its decision when it said that "it was getting towards dusk and getting shadowy *in the hole* where [Claimant] was working." (Italics added.) Employer asserts Claimant was not working in the hole but above it.

Claimant contends this argument is absurd, because Employer well knows the entire area under the freeway where they were working was referred to as "the hole." Claimant cites his own testimony, where he stated: "It was starting to get dusk and very shadowy, towards dark, because we were down in the hole and down underneath the existing bridges, so everything was getting pretty dark, starting to get dark." Shortly thereafter,

Claimant testified that he was engaged in pushing rocks into the hole just before the injury.

There is no evidence in this record, including the foregoing testimony, that the entire area under the freeway was referred to as "the hole." Claimant's testimony could well be interpreted as meaning the workers were both under the existing bridges and down in the hole where they were placing the shoring plates. On the other hand, the testimony of both Claimant and the others is clear that nobody was inside the hole where the plates were being positioned at the time of the accident. We will not assume, absent a clearer showing, that the Board misunderstood this. At any rate, and more importantly, the relevant issue is the fact it was starting to get dark in the area where the accident occurred, a fact that is not disputed.

Employer next takes issue with the Board's statement that "[Claimant] testified that if there was an alarm, there was too much ambient noise around for him to hear it." Employer contends this statement infers a finding that Claimant, in fact, did not hear the alarm, which, according to Employer, is not supported by the record.

Claimant testified that, at the time of the injury, there was other noise in the area, including the sound of traffic overhead and the sound of the excavator itself. When asked if he heard the backup alarm, Claimant testified he could not remember. In other words, he may or may not have heard it but could no longer recall. By contrast, the others present at the time all testified they did hear the alarm.

Claimant argues: "Given that there is no evidence that [Claimant] actually **heard** the alarm immediately prior to the excavator running over him, the [Board's] inference that [Claimant] couldn't hear the alarm was a fair and proper inference" In other words, the Board could reasonably infer Claimant could not hear the alarm based on a total lack of evidence as to whether he did or did not hear it. There is an obvious disconnect in Claimant's logic.

Nevertheless, we do not ascribe to the Board's statement an inferred finding that Claimant did not hear the alarm. Rather, as we shall explain later, the Board's statement goes to the conditions existing at the time of the injury and to whether, given the level of ambient noise, a spotter was needed.

Employer next takes issue with the Board's discussion of CalOSHA Safety Order No. 1592 which, according to the Board, requires either an audible backup alarm and manually operated warning device or the use of a spotter. Employer again contends the Board misstated the evidence in concluding Claimant could not hear the alarm and manual warning. However, as we explain later, the question is not whether Claimant heard the alarm or could hear it but whether the noise level, combined with all other surrounding circumstances, created a situation whereby Employer's failure to provide a spotter amounted to serious and willful misconduct.

Employer next contends the Board failed to consider the testimony of James Jacobs, a business representative for the Operating Engineers, who indicated the union contract at the

time did not require a spotter. However, there is nothing in the record to suggest the Board ignored this evidence. The fact the union contract did not require a spotter does not mean it was not otherwise required under the circumstances.

This brings us to the crux of the matter. Employer contends that, under the totality of the circumstances, there is no basis for concluding the foreman, as Employer's managing representative, "turned his mind" to the fact that the work was being performed in such a way as to expose Claimant to danger requiring the use of a spotter.

Claimant contends there is substantial evidence to support the Board's determination that a spotter was required to ensure the safety of Claimant and the others on the job. However, this puts the cart before the horse. The issue presented on a section 4553 claim is twofold. First, it must be determined whether the employer, through its managing agent, turned its mind to the existence of a danger to its employee. Only if this question is answered in the affirmative does the matter proceed to whether the employer took reasonable precautions to protect the employee against such danger. In this instance, the reasonable precaution would presumably have been the use of a spotter. However, we must first determine if substantial evidence supports a finding that Barth "turned his mind" to a danger to Claimant posed by the excavator.

The Board found use of a spotter under the circumstances was part of Employer's general duty to provide a safe place to work. Claimant testified that, in his experience, spotters are

used when people are working around heavy equipment. James Jacobs, a union business representative, testified that, on this type of job, it is standard industry practice to use a spotter. This testimony would suggest that the operation of heavy equipment around a construction site presents such a danger that it imposes a duty on the employer to provide a spotter. However, absent something more, a breach of that duty would appear to be nothing more than general negligence.

The Board also found that "Barth was on site so he actually knew of the dangerous condition involving the lack of a spotter." However, this finding merely begs the question. Because Barth was present, he was aware of any danger posed by the excavator. However, it must still be determined if the excavator, as used in this instance, posed a danger to Claimant requiring the use of a spotter as a precaution.

In that regard, the question is not whether Barth was aware that, as a general matter, an excavator poses a danger to those working around it. If that were enough, every failure to take precautions against injury from a moving excavator would be serious and willful misconduct regardless of the circumstances. Something more is required. That something more, as the cases teach, is that the employer turned its mind to a particular danger posed to the employee under the circumstances presented. In other words, it is not simply that Barth understood working around an excavator is dangerous. He must also have turned his mind to some particular danger posed by the nature of the work they were performing at the time.

In this instance, that something more is the tight quarters in which Claimant was forced to work, the ambient noise, the approach of darkness, the fact the crew had been working for 13 and one-half hours straight, and the need to hurry and get the job done that day so the crew scheduled for the next day could work in the holes.

If Barth knew of the dangers posed by a moving excavator on a construction site, which is not disputed, it may reasonably be inferred he knew of the enhanced dangers posed by these worsening conditions. Barth obviously recognized the enhanced danger, as evident by the fact he held an evening meeting to discuss with the employees the need to remain "alert" and "aware."

It may also be inferred that, given the tight schedule and the lateness of the day, Barth did not want to incur any delay necessitated by taking any further precautions, such as bringing in a spotter.

Employer contends: "Since a spotter was not required by the applicable safety orders of the [S]tate of California; since there was no union requirement that a spotter was required under the existing circumstances; since there is no evidence it was an industry-wide practice to use a spotter under the existing circumstances; since [Claimant] voluntarily joined Mr. Barth to perform the work in question; since there is no evidence [Claimant] exhibited any concern for the safety of the work he was performing voluntarily; since neither [Claimant] nor Mr. Barth voiced any concern regarding the safety of the ongoing

work activity; since the evidence of [Claimant] was that his accident was caused by a brief, but unforeseeable and unexpected turning of the excavator's path of travel; and, since Mr. Barth was standing at arm's length of [Claimant], with Mr. Barth thereby being personally exposed to any alleged hazard [Claimant] may have been allegedly exposed to when the excavator may have changed its normal, straight line path of travel; the fact the operation had been performed without incident, there is no reason for a conclusion he (Mr. Barth) 'turned his mind' to the fact the work was being performed in a way in which both he and [Claimant] could be exposed to any unsafe work condition created by a backing excavator."

Regarding safety orders, the Board indicated CalOSHA Safety Order No. 1592 did not require a spotter if an automatic backup alarm and manual warning device is in use. However, the Board further indicated it is uncertain if Claimant could hear those warnings. If the warning devices cannot be heard because of the noise level, it can hardly be said their presence relieves the employer of the need for a spotter.

As to whether the union contract required the use of a spotter, this is relevant only as it suggests use of a spotter is not an industry-wide practice. A union contract does not supersede what is otherwise required by the law. As for industry practice, Employer is incorrect that there is no evidence on this issue. As noted above, James Jacobs, the union business representative, testified that it is "standard practice

in the industry to have a spotter." Employer provided no evidence, expert or otherwise, to the contrary.

As for the fact Claimant voluntarily joined Barth near the hole, *Rogers Materials* instructs that the fact the employee undertakes the dangerous task voluntarily is of no moment. (*Rogers Materials, supra*, 63 Cal.2d at p. 724.) Likewise, it matters not that neither Claimant nor Barth expressed any concern over safety or that Barth was exposed to the same danger as Claimant. As the employer's representative, Barth may well have valued getting the job done over his own personal safety.

Employer makes much of the fact the injury was caused by a brief and unforeseen movement of the excavator. However, the evidence on this is conflicting. Employer's witnesses all testified that the excavator did not deviate from its course. If this were the case, then Claimant must have stuck his leg into the path of the excavator. The very purpose of a spotter is to watch for such eventualities and alert the driver. But even if the machine moved as Claimant testified, one of the dangers to be anticipated by a moving excavator is that those on the ground cannot always know where it may be going and take necessary precautions.

Of course, if the excavator moved off its normal course, this may be a situation that a spotter too could not have anticipated. Thus, a spotter might have determined the way was clear for the excavator to move along its normal course, only to be crossed-up at the last second. However, this is a matter of causation, which Employer does not challenge.

Finally, the fact that the excavator moved back and forth from the stack to the hole without incident does not negate the danger presented, especially where the conditions worsened as the day wore on. The question is whether Barth turned his mind to the probability that an injury would occur at some point, not that it would occur each time the excavator moved.

On the limited facts presented in this matter, we conclude the Board could reasonably have inferred Barth turned his mind to the particular danger posed by use of the excavator under the unique circumstances presented and affirmatively chose to proceed without a spotter in order to avoid further delay. We do not mean to suggest these are the only reasonable inferences that may be drawn from the evidence. However, Employer failed to provide any testimony, expert or otherwise, that use of a spotter was unnecessary under the circumstances presented. Barth himself testified that he and Lussier were acting as signalmen to alert Barba when to move the excavator. However, Barth further testified he did not perform that function at the time of the accident. And when the excavator began moving without Barth having signaled for it, Barth did not look around to make sure the way was clear.

II

Attorney Fees

Claimant has made a request for attorney fees pursuant to Labor Code section 5801.

Labor Code section 5801 provides in pertinent part: "In the event the injured employee . . . prevails in any petition by the employer for a writ of review from an award of the appeals board and the reviewing court finds that there is no reasonable basis for the petition, it shall remand the cause to the appeals board for the purpose of making a supplemental award awarding to the injured employee . . . a reasonable attorney's fee for services rendered in connection with the petition for writ of review."

The question before us in this petition for writ of review is whether the Board's conclusion that Employer engaged in serious and willful misconduct is supported by substantial evidence in light of the entire record. While we have ultimately concluded that it is, this was a close case. We cannot say there was no reasonable basis for the petition by Employer and we therefore deny Claimant's request for attorney fees.

DISPOSITION

The Board's award of enhanced benefits under section 4553 is affirmed.

We concur: _____ HULL _____, Acting P. J.

_____ BUTZ _____, J.

_____ MURRAY _____, J.