

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **PATRICK SAUCEDA,**

5 *Applicant,*

6 **vs.**

7 **FRESNO UNIFIED SCHOOL DISTRICT,**  
8 **Permissibly Self-Insured,**

9 *Defendants.*

**Case No. ADJ6718488**  
**(Fresno District Office)**

**OPINION AND DECISION AFTER**  
**RECONSIDERATION**

10 We previously granted the Petition for Reconsideration (Petition) filed by defendant to further  
11 study the factual and legal issues in this case. This is our Opinion and Decision after Reconsideration.  
12 Defendant sought reconsideration of the November 20, 2017 Findings of Fact, Order and Award (F&A),  
13 wherein the workers' compensation administrative law judge (WCJ) found that applicant, while  
14 employed as a special education teacher on September 30, 2008, sustained an industrial injury to his  
15 head, left eye, and left knee when a student assaulted him. The WCJ also found that, in failing to notify  
16 applicant that the student had documented violent tendencies and thereby putting applicant in a position  
17 of danger in the classroom, applicant's employer had engaged in serious and willful misconduct.

18 Defendant contended that the WCJ erred in finding that it engaged in serious and willful  
19 misconduct.

20 We have received an Answer from applicant. The WCJ prepared a Report and Recommendation  
21 on Petition for Reconsideration (Report), recommending that the Petition for Reconsideration (Petition)  
22 be denied.

23 We have considered the Petition, the Answer, and the contents of the Report, and we have  
24 reviewed the record in this matter. For the reasons expressed by the WCJ in his Report, which we adopt  
25 and incorporate, and for the reasons discussed below, we will affirm the decision of the WCJ.

26 **FACTS**

27 While employed by defendant as a teacher on September 30, 2008, applicant sustained an

1 accepted industrial injury to his head, left eye, and left knee following a physical attack by a student.  
2 Applicant's case was resolved by way of a Stipulations with Request for Award, and an Award issued on  
3 December 13, 2010.

4 On August 17, 2009, applicant filed a Petition for Increased Benefits for Serious and Willful  
5 Misconduct of Employer (Serious and Willful Petition). On April 26, 2016, applicant filed a First  
6 Amended Petition for Increased Benefits for Serious and Willful Misconduct of Employer (First  
7 Amended Serious and Willful Petition). As set forth in the First Amended Serious and Willful Petition,  
8 applicant alleges that his industrial injury was "the result of applicant being assaulted by a special  
9 education student who had been previously identified and known to the defendant to be a person with  
10 propensities for causing serious injury to others and who had stated on more than one occasion that he  
11 intended to kill or cause serious injury to applicant." (First Amended Serious and Willful Petition, pp. 1-  
12 2, ¶ 2.) Applicant alleges that the special education program manager, Nancy Miser, "was advised that a  
13 specific student in applicant's classroom had a prior history of physically attacking two different teachers  
14 on separate occasions at a previous school [and] that this student had made specific threats that he  
15 intended to kill or seriously injury applicant," but Ms. Miser refused a request to move the student to  
16 "another emotionally disturbed program on another campus," stating that "applicant would have to find a  
17 way to deal with the student." (*Id.* at p. 3, ¶ 3.)

18 On November 30, 2016 and September 19, 2017, the parties appeared for a trial on applicant's  
19 First Amended Serious and Willful Petition. As summarized in the WCJ's Report, the relevant testimony  
20 was as follows:

21 "Applicant has been employed as a public school instructor since the late  
22 1990's, commencing his career with Employer in an assignment at McLane High  
23 School (1998-2000.) He transferred to a school in Elk Grove in 2000, but, by  
24 2003, returned to Employer and was assigned to Fresno High School. There, he  
implemented a similar special needs student program to one he developed in Elk  
Grove.

25 However, at Fresno High, he had to request the transfer of two students who  
threatened and attacked staff. That process took only a few days.

26 At the suggestion of the Hoover principal, Applicant transferred to Hoover  
27 High in 2007. The principal wanted him to institute the special needs program at  
Hoover that he had developed at Elk Grove and Fresno High Schools.

1 The hallmark of the special needs program is to allow emotionally-disturbed  
2 students to interface with the mainstream student populations throughout the  
3 school day, to better equip the student for their ultimate societal integration upon  
4 graduation.

5 During the 2008-2009 school year, the Hoover program had 20-22 students  
6 and he 'team-taught' the program with a newly-hired teacher, teaching in the  
7 same classroom - a converted storage room.

8 Shortly after the start of that year, he learned of a new student on campus  
9 (Student Richard) who would be more appropriate in the special needs program.  
10 After the student was transferred into the program, Applicant learned that no  
11 student records had been received for Student Richard. He requested a copy of  
12 Student Richard's file from Stockton.

13 The records made it clear that Student Richard had violent tendencies,  
14 directing his anger onto one authority figure adult and, in the past, had physically  
15 attacked a teacher. These concerns were promptly relayed to the department  
16 manager, Leslie Cox, who passed those concerns on to school administration.

17 By this time, Student Richard was specifically threatening Applicant, and the  
18 group home advised that Student Richard was making the same specific physical  
19 threats against Applicant. Applicant again requested that Student Richard be  
20 removed.

21 A meeting was convened to address these concerns, attended by Applicant,  
22 the department supervisor and manager, and the school psychologist. Applicant  
23 presented Student Richard's file material, advising that he was fearful for his  
24 personal safety. Applicant was informed that it was his 'problem.'

25 The teacher-student relationship worsened; Student Richard was repeatedly  
26 suspended. Applicant was told by the principal and other members of the Hoover  
27 High administration that there was nothing they could do.

On the date of injury, Student Richard came into class and directly confronted  
Applicant about a call to his group home. The student approached in a  
threatening manner; Applicant instructed Student Richard to back down.

The classroom had no radio or telephone for use in case of an emergency.  
Applicant turned to instruct his co-teacher to clear the classroom, Student  
Richard struck him on the temple; Applicant managed to grapple the student to  
the ground. A Campus probationary officer arrived on scene, Student Richard  
was handcuffed and taken away.

In the form of expert testimony, a local attorney stated that Education Code §  
49079 mandates that information about students who exhibit violent tendencies  
must be disclosed to school staff expected to come into contact with those  
students. Any school that willfully fails to notify a teacher of a potential danger  
has committed a criminal misdemeanor.

The Special Needs Manager testified that she had no authority to effect a  
transfer of Student Richard and there was nothing she could do about the  
situation. She never thought Applicant would be injured. The Special Needs  
supervisor acknowledged that all classrooms are supposed to be equipped with

1 radios or telephones.

2 The school principal testified that he assumed the classroom was fully-  
3 equipped, but he never felt he was exposing Applicant to unreasonable risk and  
4 that the Education Code requires that affected employees must be notified of  
5 special risks, but as a principal, he lacks authority to expel a student in  
6 anticipation of a violent act but Employer was required to inform Applicant of  
7 the danger and it was the first time he saw the report.” (Report, pp. 2-3.)

8 On November 20, 2017, the WCJ issued his F&A, finding that applicant had sustained an  
9 industrial injury to his head, left eye, and left knee when a student assaulted him and that applicant’s  
10 employer had engaged in serious and willful misconduct by failing to notify applicant that the student  
11 had documented violent tendencies, thereby putting applicant in a position of danger in the classroom.

12 Defendant timely sought reconsideration, contending that the WCJ had erred in finding that it  
13 engaged in serious and willful misconduct.

#### 14 DISCUSSION

15 Under Labor Code section 4553, if a worker sustains an industrial injury “by reason of the serious  
16 and willful misconduct” of an employer, the injured worker may receive “[t]he amount of compensation  
17 otherwise recoverable ... increased one-half[.]” An employer may be liable for serious and willful  
18 misconduct that causes a worker’s injury where the employer is found to have performed “one of three  
19 alternatives: (a) a deliberate act for the purpose of injuring another; (b) an intentional act with knowledge  
20 that serious injury is a probable result; or (c) an intentional act with a positive and reckless disregard of  
21 its possible consequences.” (*American Smelting & Refining Co. v. Workers’ Comp. Appeals Bd.* (1978)  
22 79 Cal.App.3d 615, 620 [43 Cal.Comp.Cases 424].) As to the second alternative, a finding of liability  
23 under Labor Code section 4553 is appropriate where the employer 1) knew of the dangerous condition;  
24 2) knew that the probable consequences of the continuance of that condition would involve serious injury  
25 to an employee; and 3) deliberately failed to take corrective action. (*John-Manville Sales Corp. Private*  
26 *Carriage v. Workers’ Comp. Appeals Bd. (Horenberger)* (1979) 96 Cal.App.3d 923, 933 [44  
27 Cal.Comp.Cases 878].) Mere negligence, even gross negligence, is not enough to sustain a finding of  
willful misconduct. (*Mercer-Fraser Co. v. Indus. Acc. Com. (Soden)* (1953) 40 Cal.2d 102, 119-20 [18  
Cal.Comp.Cases 3].) Instead, the conduct must be “of a quasi-criminal nature, the intentional doing of

1 something either with the knowledge that it is likely to result in serious injury, or with a wanton and  
2 reckless disregard of its possible consequences....” (*Id.* at p. 117 [quoting *Porter v. Hofman* (1938) 12  
3 Cal.2d 445, 447-48].)

4 To meet the knowledge requirement of Labor Code section 4553, an injured worker must show  
5 that the employer knew “the probable consequences of his failure to provide more adequate safety  
6 devices or a safer place to work. [The employer] must have put his mind to the existence of a danger to  
7 an employee and have failed to take precautions to avert that danger.” (*Abron v. Workmen’s Comp.*  
8 *Appeals Bd.* (1973) 34 Cal.App.3d 232, 238 [38 Cal.Comp.Cases 591].) Circumstantial evidence may  
9 support or even compel a finding of the requisite knowledge. (*Dowden v. I.A.C.* (1963) 223 Cal.App.2d  
10 124, 132 [28 Cal.Comp.Cases 261].)

11 Additionally, California school districts have an affirmative duty to inform the teachers in their  
12 employ if any of their pupils have “engaged in, or [are] reasonably suspected to have engaged in,” acts  
13 including “caus[ing, or] attempt[ing] to cause, or threaten[ing] to cause physical injury to another  
14 person” and “[w]illfully us[ing] force or violence upon the person of another, except in self-defense.”  
15 (Ed. Code, §§ 48900(a)(1) & (a)(2), 49709.) A knowing failure “to provide information about a pupil  
16 who has engaged in, or who is reasonably suspected to have engaged in” these acts constitutes a  
17 misdemeanor offense. (Ed. Code, § 49079(c).)

18 In the matter before us, we agree with the WCJ that defendant engaged in serious and willful  
19 misconduct by failing to warn applicant of the assaulting student’s propensity for violence. While we are  
20 mindful of the privacy concerns cited by the dissent, the plain language of the Education Code is  
21 unambiguous: school districts have an affirmative duty to warn their teacher employees when they  
22 become aware that a student has engaged, or is likely to engage, in violent acts, and a knowing failure to  
23 do so rises to the level of a misdemeanor offense. Thus, this failure to act is sufficient to trigger the  
24 provisions of Labor Code 4553.

25 As discussed above, under subdivision (b) of Labor Code section 4553, a finding of liability is  
26 appropriate where the employer 1) knew of the dangerous condition; 2) knew that the probable  
27 consequences of the continuance of that condition would involve serious injury to an employee; and 3)

1 deliberately failed to take corrective action. (*John-Manville Sales Corp. Private Carriage v. Workers'*  
2 *Comp. Appeals Bd. (Horenberger)* (1979) 96 Cal.App.3d 923, 933 [44 Cal.Comp.Cases 878].)

3 Here, it is undisputed that defendant knew of the dangerous condition. Defendant has admitted to  
4 knowing that the student assailant had a prior history of physically attacking two different teachers on  
5 separate occasions at a previous school and that this student had made specific threats that he intended to  
6 kill or seriously injury applicant. (November 30, 2016 Minutes of Hearing and Summary of Evidence  
7 [MOH/SOE], pp. 6, ¶ 9 – 7, ¶ 5, pp. 11, ¶ 10 – 12, ¶ 4.) Moreover, defendant also knew – because  
8 applicant brought this to defendant's attention after reviewing the student's file – that the student  
9 assailant had a habit of fixating his attention and anger on one particular teacher, and that applicant  
10 appeared to be in danger of becoming a fixation point for the student assailant's anger. (*Id.*)

11 It is likewise undisputed that defendant knew that the probable consequences of the dangerous  
12 condition would involve serious injury to an employee. The records in the student assailant's file show a  
13 pattern of physical attacks once the student had begun fixating on a teacher as a point for his frustration  
14 (see *id.*); moreover, because the student assailant is physically larger than applicant, serious injury was  
15 more likely to ensue from any physical confrontation (see *id.* at p. 10, ¶ 1.)

16 Finally, applicant has amply shown that defendant deliberately failed to take corrective action.  
17 Defendant has made no attempt to deny that, when presented with the evidence from the student  
18 assailant's file, the administrative team at applicant's place of work declined to take any action to remove  
19 the student assailant from applicant's classroom: Ms. Miser, the Special Education Manager, stated that  
20 this was not her responsibility but would have been up to the principal (November 30, 2016 MOH/SOE,  
21 p. 12, ¶¶ 1-6), although she also stated that she did not inform the principal of applicant's concerns  
22 regarding the student assailant (*id.* at p. 13, ¶¶ 3 & 4 [“Assaulting a teacher is not an unusual finding in a  
23 report about emotionally disturbed students, so she had no concern for Applicant's safety.”]).

24 Thus, as stated above, we agree with the WCJ that defendant engaged in serious and willful  
25 misconduct by failing to warn applicant of the assaulting student's propensity for violence. Accordingly,  
26 we will affirm the F&A.

27 / / /

1 For the foregoing reasons,

2 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation  
3 Appeals Board, that the November 20, 2017 Findings of Fact, Order and Award is **AFFIRMED**.

4 **WORKERS' COMPENSATION APPEALS BOARD**

5 **ANNE SCHMITZ DEPUTY**

6 /s/

7  
8 **I CONCUR,**

9 **CHAIR**

10 **KATHERINE ZALEWSKI**

11 /s/



12  
13  
14 **I DISSENT (see attached dissenting opinion),**

15  
16 **JOSÉ H. RAZO**

17 /s/

18  
19  
20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21 **APR 08 2020**

22  
23 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**  
24 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

25 **PATRICK SAUCEDA**  
26 **THOMAS J. TUSAN, ATTORNEY AT LAW**  
**LAW OFFICES OF JANE WOODCOCK**

*acw*

27 **REB/pc**

**SAUCEDA, Patrick**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**DISSENTING OPINION OF COMMISSIONER RAZO**

I dissent.

I do not take issue with the majority's legal analysis, as far as it goes. However, I believe that the majority has ignored an important consideration to which defendant alluded in its Petition: the rights of the student who assaulted applicant. In the first place, this student has a fundamental right to privacy, and the school leadership had to balance that right to privacy with its duty to inform the student's teachers of any violent acts pursuant to the Education Code.

Further, as set forth in the Petition, the student also has a right to be provided with educational services and to attend school. (Petition, p. 9:17-19.) The education code continues to apply even in the case of a student who has acted, or indicated that he will act, in a violent manner, and an administration may not suspend, transfer, or expel a student based on mere speculation. (*Id.* at pp. 9:24-10:3.)

For this reason, I would rescind the F&A and substitute a finding that defendant had not engaged in serious and willful misconduct.



**WORKERS' COMPENSATION APPEALS BOARD**

**JOSÉ H. RAZO**

*/s/*

**JOSÉ H. RAZO, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**APR 08 2020**

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

**PATRICK SAUCEDA  
THOMAS J. TUSAN, ATTORNEY AT LAW  
LAW OFFICES OF JANE WOODCOCK**

*acw*

**REB/pc**