

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/

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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

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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