

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **HILLARY SCHWARTZ,**

5 *Applicant,*

6 **vs.**

7 **EASE ENTERTAINMENT; STARR  
8 INDEMNITY AND LIABILITY COMPANY,**

9 *Defendants.*

**Case No. ADJ9392012  
(Van Nuys District Office)**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

10 Defendant, Ease Entertainment, by and through its insurer, Starr Indemnity & Liability Company,  
11 seeks reconsideration of the Findings and Award and Order, issued December 21, 2015, in which a  
12 workers' compensation administrative law judge (WCJ) found applicant, Hillary Schwartz, sustained an  
13 industrial injury to her psyche on February 20, 2014, while employed as a first assistant director, finding  
14 against defendant's affirmative defense under Labor Code section 3600(a)(8). Applicant was awarded  
15 temporary disability and further medical treatment, and all other issues were deferred.

16 Defendant contests the WCJ's finding that applicant's claim is not barred under Section  
17 3600(a)(8), contending that applicant's claim for injuries was caused by the commission of a felony for  
18 which she was convicted in the State of Georgia.

19 Applicant has filed an Answer to defendant's Petition for Reconsideration, and the WCJ has  
20 prepared a Report and Recommendation on Petition for Reconsideration, recommending that the Petition  
21 be denied.

22 We will affirm the WCJ's determination and deny defendant's Petition for Reconsideration, as  
23 applicant has not been convicted of a felony as required by the affirmative defense in Section 3600(a)(8).

24 **I.**

25 The WCJ found applicant sustained an injury to her psyche, Post-Traumatic Stress Disorder,  
26 Acute, while employed as a first assistant director by Ease Entertainment on February 20, 2014. Her  
27 injury arose out of an incident in which a member of the film crew was killed during the filming of a

1 scene for a movie, Midnight Rider: The Gregg Allman Story, near Doctorstown Landing, Georgia.

2 At trial on October 26, 2015, applicant testified that she worked under the director of the film and  
3 was involved in setting up the shoot on a train trestle. The film crew had sought permission from the  
4 railroad company to use the train trestle, but were told they were not permitted to use it. The crew also  
5 believed there were only going to be two trains using the tracks that day, and had placed a hospital bed as  
6 a prop on the tracks after the second train had passed. They were surprised when a third train came  
7 through at a high rate of speed. The train hit the bed, causing it to strike a member of the crew, resulting  
8 in her death, and the injury of six others.

9 Applicant, the director and two producers were each charged with criminal trespass and  
10 involuntary manslaughter under the criminal statutes of the State of Georgia. Applicant accepted a plea  
11 agreement under the Georgia First Offender Act whereby she would be found guilty of the charges and  
12 would be placed on probation for ten years. Upon the successful completion of her probation, there  
13 would be no entry of judgment and no adjudication of guilt.

14 Pursuant to this agreement, a Bench Trial was held on March 10, 2015, in the Superior Court of  
15 Wayne County, State of Georgia, before Judge Anthony Harrison. The prosecution, with the agreement  
16 of applicant's attorney, presented the testimony of a Detective with the County Sheriff's office to  
17 establish the underlying facts supporting the criminal indictment. The Detective testified that in the  
18 course of his investigation he learned that applicant and the other defendants knew that CSX, the owner  
19 of the railroad tracks and trestle, had denied them permission to film on the train trestle. He further  
20 testified that he learned from applicant, based upon her testimony during an OSHA investigation, that as  
21 first assistant director, she had general responsibility for safety on the film set and had responsibility to  
22 follow Safety Bulletin number 28, involving working on railroad tracks, issued by the Directors Guild of  
23 America, of which she was a member. He further testified that applicant had told members of the crew  
24 not to place anything across the tracks, and that all of the principals of the film, including applicant, knew  
25 that the train tracks were "live," and that trains had come by that day.

26 Upon consideration of the evidence presented, and after applicant affirmatively waived her right  
27 to a trial by jury and made no objection to the evidence presented or offered any on her own behalf,

1 Judge Harrison made the following statement on the record:

2 "I have reviewed and considered the evidence and testimony. I have taken  
3 a look at State's Exhibits 6 and 7.

4 And I do, Ms. Schwartz, based upon the evidence, find you guilty in Count  
5 1 of criminal trespass and guilty in Count 5 of involuntary manslaughter."

6 The Judge then adopted the prosecution's recommended sentence, imposed under the First  
7 Offender Act, that applicant be sentenced to ten years under the control of the Georgia Department of  
8 Corrections and be placed on probation, pay a \$5,000.00 fine, and be precluded from working as a  
9 director, producer, first assistant director, or any department head responsible for safety issues on any  
10 cinema or TV production or publication.

11 The Judge approved applicant's "First Offender Petition," which states that the Court entered a  
12 verdict of guilty to the offenses and that "no judgment has been entered and no adjudication of guilt has  
13 been made." The Petition further states: "Defendant hereby consents to the Court's withholding the entry  
14 of a judgment of guilt, deferring adjudication, and deferring further proceedings, placing her on probation  
15 as provided by O.C.G.A. §42-8-60."

16 II.

17 Labor Code section 3600(a)(8) provides:

18 (a) Liability for the compensation provided by this division, in lieu of any  
19 other liability whatsoever to any person except as otherwise specifically  
20 provided in Sections 3602, 3706, and 4558, shall, without regard to  
21 negligence, exist against an employer for any injury sustained by his or her  
22 employees arising out of and in the course of the employment and for the  
23 death of any employee if the injury proximately causes death, in those  
24 cases where the following conditions of compensation concur:

25 ...

26 (8) Where the injury is not caused by the commission of a felony, or a  
27 crime which is punishable as specified in subdivision (b) of Section 17 of  
the Penal Code, by the injured employee, for which he or she has been  
convicted.

The only reported case involving Labor Code section 3600(a)(8) is *Liebensperger v. Workers'*  
*Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 506 [writ den.]. In that case, a claim for injuries  
sustained in a car accident was held to be barred, where the applicant pled guilty to a felony charge of

1 vehicular manslaughter with gross negligence and served a two year prison sentence. The affirmative  
2 defense was applied as the applicant was convicted on his guilty plea to the felony charge and was  
3 sentenced to state prison. There was no dispute in that case regarding whether the applicant was  
4 convicted of a felony.

5 The criminal prosecution of applicant in Georgia did not result in a conviction under the laws of  
6 that state. Applicant was found guilty by the Court and was sentenced to ten years probation pursuant to  
7 the Georgia First Offender law. (O.C.G.A.<sup>1</sup> §42-8-60.) The First Offender law provides for a deferral of  
8 the adjudication of guilt to allow first time offenders the opportunity to complete a period of probation.

9 (a) Upon a verdict or plea of guilty or a plea of nolo contendere, but before  
10 an adjudication of guilt, in the case of a defendant who has not been  
11 previously convicted of a felony, the court may, without entering a  
12 judgment of guilt and with the consent of the defendant:

13 (1) Defer further proceeding and place the defendant on probation as  
14 provided by law; or

15 (2) Sentence the defendant to a term of confinement as provided by law.

16 The successful completion of probation under this program acts to exonerate a defendant such  
17 that the defendant "shall not be considered to have a criminal conviction." OCGA § 42-8-62(a) provides:

18 Upon fulfillment of the terms of probation, upon release by the court prior  
19 to the termination of the period thereof, or upon release from confinement,  
20 the defendant **shall be discharged without court adjudication of guilt.**  
21 Except for the registration requirements under the state sexual offender  
22 registry [as provided in OCGA § 42-1-12] and except as otherwise  
23 provided in Code Section 42-8-63.1, the discharge shall completely  
24 exonerate the defendant of any criminal purpose and shall not affect any of  
25 his or her civil rights or liberties; and **the defendant shall not be**  
26 **considered to have a criminal conviction.** (Emphasis added.)

27 Additionally, O.C.G.A. §42-8-63 provides:

Except as otherwise provided in this article, **a discharge under this article**  
**is not a conviction of a crime** under the laws of this state and may not be  
used to disqualify a person in any application for employment or  
appointment to office in either the public or private sector." (Emphasis  
added.)

According to Georgia law, a "conviction" requires that a final judgment of conviction be entered

<sup>1</sup> Official Code of Georgia Annotated.

1 upon a verdict or finding of guilty of a crime or upon a plea of guilty. (O.C.G.A. § 16-1-3 (4).) A first  
2 offender's guilty plea under the Georgia First Offender Act therefore does not constitute a "conviction"  
3 as that term is defined in the Criminal Code of Georgia. (*Davis v. State* (2000) 273 Ga. 14.)

4 The WCJ concluded that under a strict interpretation of the language of section 3600(a)(8), a  
5 conviction is required to bar a claim for workers' compensation benefits. In view of the deferral of  
6 applicant's prosecution after a finding of guilt by the Court, the WCJ concluded that the requirement that  
7 applicant's injury be caused by the commission of a felony for which she was "convicted" has not been  
8 met.

9 Defendant argues that Georgia law defining a conviction is inapplicable, and that under *People v.*  
10 *Laino* (2004) 32 Cal.4th 878, a finding of guilt alone should be held to constitute a conviction. In *Laino*,  
11 the Court held that a guilty plea for aggravated assault with a handgun in a domestic violence case in  
12 Arizona, which resulted in a suspended sentence and probation, constituted a prior conviction for  
13 purposes of California's Three Strikes sentencing laws.

14 All that remains, therefore, is to determine whether defendant's Arizona  
15 guilty plea meets the requirements of a guilty plea under the three strikes  
16 law. It does. Defendant in the prior case waived his right to a court or jury  
17 trial and entered a plea of guilty to aggravated assault pursuant to a written  
18 plea agreement. The Arizona court questioned defendant, found there was a  
19 factual basis for his plea, and accepted the plea. Defendant was placed on  
20 probation and imposition of sentence was suspended. Our three strikes law  
21 specifically provides that the suspension of imposition of sentence does not  
22 affect the determination that such prior conviction constitutes a strike.  
(*People v. Laino* (2004) 32 Cal.4th 878, 898.)

20 The result in *Laino* was compelled by the statutory requirements of the Three Strikes law in Penal  
21 Code sections 667<sup>2</sup> and 1170.12<sup>3</sup>. Those sections specifically provide that a suspension of imposition of

23 <sup>2</sup> Penal Code section 667(d)(1)(A) & (B) provides in part:

24 None of the following dispositions shall affect the determination that a prior  
25 conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

26 (A) The suspension of imposition of judgment or sentence.

27 (B) The stay of execution of sentence.

26 <sup>3</sup> Penal Code section 1170.12(b)(1)(A) & (B) provides in part:

27 None of the following dispositions shall affect the determination that a prior  
serious and/or violent conviction is a serious and/or violent felony for purposes of

1 judgment or sentence or a stay of execution of sentence shall not affect the determination whether a prior  
2 offense can be considered for a sentence enhancement. Thus, defendant argues that it should have no  
3 liability for applicant's injuries since they arose from the "commission of a felony," as found by the court  
4 in Georgia. (Petition, 5:20-21.)

5 In contrast to the basis for the holding in *Laino*, there is no equivalent language in Labor Code  
6 section 3600(a)(8) that mandates that we disregard the absence of a conviction under Georgia law.  
7 Contrary to defendant's argument, the bar under section 3600(a)(8) only applies to a "commission of a  
8 felony" that results in a conviction. The WCJ correctly concluded that applicant's claim for an industrial  
9 injury was not barred since under the laws of Georgia applicant has not been convicted of a felony.

10 Accordingly, we will affirm the Findings and Award and Order and will deny defendant's  
11 Petition for Reconsideration.

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26 this section:

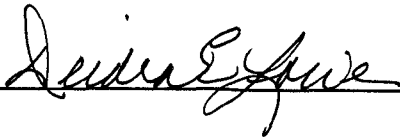
(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

1 For the foregoing reasons,

2 **IT IS ORDERED** that the Petition for Reconsideration, dated January 11, 2016, is **DENIED**.

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4 **WORKERS' COMPENSATION APPEALS BOARD**

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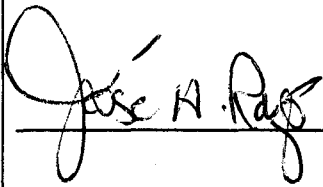
7 **DEIDRA E. LOWE**

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10 **I CONCUR,**

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12 \_\_\_\_\_

13 **FRANK M. BRASS**

14 **I DISSENT (See Dissenting Opinion),**

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16 \_\_\_\_\_

17 **JOSÉ H. RAZO**



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

20 **MAR 10 2016**

21  
22 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**  
23 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

24 **HILLARY SCHWARTZ**  
25 **ROSE KLEIN**  
26 **CIPOLLA CALABA**



27 **SV/pc**

1 **DISSENTING OPINION**

2 I dissent. Labor Code section 3600(a)(8) provides that liability for compensation, without regard  
3 to negligence, exists against an employer for any injury sustained by his or her employees arising out of  
4 and in the course of the employment, in those cases where the following conditions of compensation  
5 concur:

6 (8) Where the injury is not caused by the commission of a felony, or a  
7 crime which is punishable as specified in subdivision (b) of Section 17 of  
8 the Penal Code, by the injured employee, for which he or she has been  
9 convicted.

10 I would find applicant is barred from receiving workers' compensation benefits under Labor Code  
11 section 3600(a)(8), based upon the fact that her injury to her psyche arose as a consequence of her  
12 commission of a felony, the involuntary manslaughter of Sarah Jones, for which applicant was convicted  
13 by a Superior Court Judge in Georgia, following an evidentiary hearing on March 10, 2015.

14 The evidence provided at that hearing, through the testimony of Detective Joe Gardner of the  
15 Wayne County Sheriff's Office, established that applicant, as first assistant director of the film Midnight  
16 Rider, had general responsibility for safety on the film set. As a first assistant director, applicant was a  
17 member of the Directors Guild of America, which provides safety guidelines for filming on railroad  
18 tracks, including the requirement that they have permission to use and place props on the tracks. It was  
19 also established that applicant had knowledge that the film had been denied permission to use the train  
20 tracks and train trestle by CSX, the railroad that owned the tracks and the trestle, and that they were  
21 trespassing on the tracks. It was further established that all of the principals involved, the director, the  
22 producers and applicant, knew that the train tracks were "live" and were being used by CSX on that day.

23 Despite having knowledge that the film did not have permission to use the train trestle, applicant  
24 participated in allowing the film crew to place a hospital bed on the train trestle. It was determined that  
25 an unexpected train appeared without adequate warning to allow the film crew to safely evacuate the  
26 train trestle. The unexpected train struck the hospital bed in such a manner as to cause the death of Sarah  
27 Jones, a member of the film crew.

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1 After considering the evidence, the Superior Court Judge made the following statement on the  
2 record:

3 "I have reviewed and considered the evidence and testimony. I have taken  
4 a look at State's Exhibits 6 and 7.

5 And I do, Ms. Schwartz, based upon the evidence, find you guilty in Count  
6 1 of criminal trespass and guilty in Count 5 of involuntary manslaughter."

7 Before the Court sentenced applicant according to the terms of the recommended sentence, for the  
8 crime of which he found her guilty, the father of Sarah Jones made a statement,

9 I'd like to take a moment just to emphasize the importance in the film  
10 industry of the assistant director, that they are in charge of safety, and to  
11 emphasize that Ms. Schwartz apparently failed in her duty to do so. That  
12 being said, this is a very difficult decision for Elizabeth and myself, but  
13 considering the situation, we --we are in agreement with the District  
14 Attorney to --of this resolution.

15 The record of the Georgia court proceedings includes applicant's Motion to Dismiss Indictment  
16 with Prejudice for Prosecutorial Misconduct, to Disqualify, and to Suppress, based upon a contention that  
17 the prosecution violated an offer of immunity to applicant, to which the District Attorney responded. In  
18 his response, it was stated that applicant was initially considered a witness whose testimony would be  
19 used in the prosecution of the other defendants who had been indicted by a Grand Jury. However, when  
20 applicant made statements and representations that were inconsistent with the testimony of other  
21 witnesses and evidence collected during the investigation of the case, the Grand Jury returned a  
22 superseding indictment against applicant. Applicant's Motion was denied. Thus, it appears that applicant  
23 presented a story to the investigators in an attempt to exonerate herself, but which seemed sufficiently  
24 false that the prosecution obtained an indictment against applicant.

25 As a consequence of applicant's conduct, she was determined by a Superior Court Judge to have  
26 committed acts which constitute a felony. The Judge found applicant guilty of criminal trespass and  
27 involuntary manslaughter in the death of Sarah Jones. This finding constitutes applicant's conviction of a  
28 felony, which under Labor Code section 3600(a)(8), bars her claim for workers' compensation benefits  
29 for an injury to her psyche arising out of her felonious conduct. That applicant was subsequently  
30 accorded leniency in her sentencing does not obviate the fact that she was found guilty of involuntary

1 manslaughter. I would therefore grant defendant's Petition for Reconsideration and find applicant's claim  
2 is barred.



**WORKERS' COMPENSATION APPEALS BOARD**

**JOSE H. RAZO, COMMISSIONER**

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

11 **MAR 10 2016**

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

15 **HILLARY SCHWARTZ  
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