WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

THOMAS DAVID WILLIAMS, *Applicant*

vs.

MACKENZIE ELECTRICAL INC., STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ2167155 (VNO 0443514)
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in order to study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant and defendant both sought reconsideration of the Findings and Award (F&A) issued by a workers' compensation administrative law judge (WCJ) on August 2, 2021. The WCJ found in relevant part that defendant "MACKENZIE ELECTRICAL INC." is guilty of a violation of Labor Code section 4453[2] thereby entitling applicant to an increase in compensation and attorneys' fees of 15% thereon and awarded applicant an increase in compensation pursuant to section 4453 and attorneys' fees.

Applicant contends that the award should have specified the dollar amount of $537,449.36 pursuant to the parties' previous stipulations. Subsequently, applicant filed an amended Petition, requesting that the award be issued against "Mac Kenzie Electric Inc." rather than "MacKenzie Electric Inc."

Defendant contends that the WCJ failed to apply the appropriate legal standard for serious and willful misconduct; that applicant did not meet his burden to prove serious and willful misconduct by defendant; that the WCJ did not address all of the evidence in her decision and that

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[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated October 7, 2021. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

the decision was not based on substantial evidence; that defendant was denied due process by holding the hearing electronically; and that newly discovered evidence demonstrates improper conduct by applicant's counsel.

We received an Answer from applicant to defendant's Petition. We did not receive an answer from defendant.

We received three Reports and Recommendations (Reports) from the WCJ in response to each of the Petitions. The WCJ recommends that we amend the F&A pursuant to applicant's requests to specify the dollar amount of the award and to change the name of defendant. She further recommends that defendant's Petition should be denied.

We have considered the allegations of the Petitions for Reconsideration by applicant and by defendant and the Answer and the contents of the Reports with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Reports, all of which we adopt and incorporate, we will affirm the Findings, Award and Order, except that we will amend it to provide that the dollar amount of the award must be adjusted by the parties with jurisdiction reserved to the WCJ in the event of a dispute (Award, a) and to defer the additional issue of whether the defendant's name should be corrected according to proof with jurisdiction reserved to the WCJ to correct the name according to proof and issue an amended F&A as appropriate (Finding 3).

I.

We first consider applicant's Petitions.

As noted, we did not receive an answer from defendant, and defendant did not respond to the WCJ's recommendations in her Reports that we amend the F&A pursuant to applicant's request for a specified dollar amount of $537,449.36 and to change the name of defendant to "Mac Kenzie Electric Inc."

With respect to the request that we amend the F&A to include the dollar amount, in applicant's original Petition, he sets forth complete calculations based on the previous Compromise and Release of December 18, 2017 and the Stipulations with Request for Award dated December 10, 2019. However, decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) "A stipulation is 'An agreement between opposing counsel … ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,' (Ballentine, Law Dict. (1930) p. 1235, col. 2) and serves 'to obviate

need for proof or to narrow range of litigable issues' (Black's Law Dict. (6th ed. 1990) p. 1415, col. 1) in a legal proceeding." (*County of Sacramento v. Workers' Comp. Appeals Bd*. (*Weatherall*) (2000) 77 Cal.App.4th 1114, 1118 [65 Cal.Comp.Cases 1]; see Lab. Code, § 5702.) While we do not dispute that applicant's calculations are likely correct, and we acknowledge that defendant's failure to respond could be considered a tacit acceptance that $537,449.36 is the correct amount, we hesitate to amend the F&A in the absence of an evidentiary record or a stipulation by the parties. Accordingly, we will amend the award to state that the amount shall be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute. In the event that the parties fail to cooperatively and in good faith reach an agreement as to the dollar amount and thereafter seek WCAB intervention, the WCJ should consider whether sanctions are appropriate.

Turning to whether we should amend defendant's name, defendant's Petition is by "MacKenzie Electric, Inc.," "insured by State Compensation Insurance Fund" and is filed by an attorney for defendant State Compensation Fund, Marjorie A. Marenus. Throughout the Petition, defendant consistently refers to itself as "MacKenzie Electric," and attached to the Petition is a declaration signed under penalty of perjury by "Patrick MacKenzie" and a declaration signed under penalty of perjury by "Denis MacKenzie."[3]

In Exhibit R, titled as "Bill of Sale of John Deere 310D Backhoe Loader to Ed Ernst," the bill of sale is on letterhead titled "MacKenzie Electric, Inc." with license # 664395, the seller is listed as "Patrick MacKenzie, President" and the transferor is listed as "Patrick MacKenzie." Yet, the California State License Board lists "Mac Kenzie Electric Inc" for license # 664395 and "Denis Anthony Mac Kenzie" and "Patrick Christopher Mac Kenzie" as personnel associated with the license. (See Evid. Code, § 452(c) [allowing judicial notice of official acts by an executive department].)

WCAB Rule 10390(a) (Cal. Code Regs., tit. 8, §10390(a)) requires that any party that appears or files a pleading before the WCAB shall set forth "the party's full legal name on the record of proceedings, pleading, [or] document." Pursuant to AD Rule 10205.5 (Cal. Code Regs., tit. 8, § 10205.5), the Division of Workers' Compensation (DWC) maintains the "official

[3] We do not consider the substance of the declarations except to note that since the allegations concern the February 21, 2021 hearing, and defendant did not raise the issue at the next hearing on May 6, 2021, the proposed evidence appears to be evidence that could have been discovered and produced at the time of trial with reasonable diligence by defendant.

participant record" or official address record (OAR) for all cases, and all parties must ensure at all times that they are correctly identified on the OAR.

Here, based on our review, it is not clear from the record whether defendant is "MacKenzie Electric, Inc." or "Mac Kenzie Electric, Inc." This conflict is particularly underscored by the circumstances here where the individuals appear to use both last names interchangeably, and there is no doubt that this information is within defendant's knowledge. Instead, as noted previously, defendant failed to respond to the WCJ's recommendation to change its name, thereby causing further delays. Moreover, as explained above, it is defendant's responsibility to communicate with DWC as required by AD Rule 10205.5 to correct any discrepancies in its name.

We direct defendant's attorney Marjorie A. Marenus and State Compensation Insurance Fund to immediately review the OAR and make any necessary changes, and to promptly notify the WCJ thereafter.

We strongly emphasize that defendant must comply with its obligations under WCAB Rule 10390(a) and AD Rule 10205.5. More significantly, failure to provide the correct information may impede applicant's ability to proceed against defendant under section 5806. Again, if defendant is uncooperative, the WCJ should consider whether sanctions are appropriate. In the meantime, we will leave the award intact, but we will also defer the issue to the WCJ to determine whether the name of the defendant should be changed, and upon return, the WCJ can consider whether to hold an evidentiary hearing.

II.

Finally, we address defendant's contention that it was denied due process when the hearings were held electronically. As stated in our significant panel, *Gao vs. Chevron Corp.* (2021) 86 Cal.Comp.Cases 44, 47-48:

> The "essence of due process is simply notice and the opportunity to be heard." (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd*. (1999) 74 Cal.App.4th 928, 936 [88 Cal.Rptr.2d 516].) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties' rights to due process. (*Gangwish*, *supra*, 89 Cal.App.4th 1284, 1295, citing *Rucker*, *supra*, 82 Cal.App.4th 151, 157-158.)
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> Due process requires "a 'hearing appropriate to the nature of the case.'" (*In re James Q*. (2000) 81 Cal.App.4th 255, 265, quoting *Mullane v. Cent. Hanover Bank & Trust Co*. (1950) 339 U.S. 306, 313.) Although due

> process is "a flexible concept which depends upon the circumstances and a balancing of various factors," it generally requires the right to present relevant evidence. (*In re Jeanette V*. (1998) 68 Cal.App.4th 811, 817.)
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> The WCAB's transition to remote hearings is not based upon some bureaucratic whimsy, but rather upon the advent of a global pandemic that has cost the lives of hundreds of thousands, and caused fundamental shifts in the behavior of most of the world's population. *Due process is the process that is due under the circumstances as we find them, not as we might wish them to be.* Executive Order N-63-20 represents the Governor's best judgment as to how to strike a fair balance between the due process rights of participants in hearings, the necessity of protecting the public from real and significant harm, and the state's responsibilities under the California Constitution to provide efficient, timely resolution of disputes in order to secure benefits for eligible injured workers. (Italics added.)

Here, defendant has failed to demonstrate that conducting the hearings electronically denied it an opportunity to be heard and present its evidence. Based on our review of the record, the WCJ considered all of the evidence, including all witness testimony, and reached her conclusion that defendant violated section 4453, and we decline to disturb her determination.

Accordingly, we affirm the F&A, except that we amend it to provide that the dollar amount of the award must be adjusted by the parties with jurisdiction reserved to the WCJ in the event of a dispute (Award, a) and to defer the issue of whether the defendant's name should be corrected according to proof with jurisdiction reserved to the WCJ to correct the name according to proof and issue an amended F&A as appropriate (Finding 3).

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Order by the workers' compensation administrative law judge on August 2, 2021 is **AFFIRMED** except that is **AMENDED** as follows:

FINDINGS OF FACT

3. The issue of whether the name of defendant "MacKensie Electrical Inc." should be changed according to proof is deferred to the WCJ with jurisdiction reserved to the WCJ to correct the name according to proof and issue an amended F&A as appropriate.

AWARD

AWARD IS MADE in favor of THOMAS WILLIAMS against MACKENZIE ELECTRICAL INC. of:

a. An increase in compensation pursuant to Labor Code §4453. The dollar amount of the award shall be adjusted by the parties with jurisdiction reserved to the WCJ in the event of a dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 2, 2022

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

THOMAS DAVID WILLIAMS
LAW OFFICES OF JEROME SKLEROV
STATE COMPENSATION INSURANCE FUND

AS/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

JUDGES REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

1.	Findings of Fact and Order:	08/01/2021 service 08/02/2021
2.	Identity of Petitioner:	Applicant
3.	Verification:	yes
4.	Timeliness:	Timely
5.	Date Petition for Reconsideration filed:	08/12/2021

6. Petitioner has filed a Petition for Reconsideration, without contention of error in the decision, but contends that the Award should have issued in a monetary amount certain in the sum of $537,449.36.

II. DISCUSSION

This has been one of the most contentious and litigated cases in my experience. The history reveals each decision made by any judge was appealed by one or sometimes both sides. The Award was made in general form since parties have a history of achieving a different result by themselves in the end.

Petitioners accounting appears to be accurate in terms of the several benefits awarded. At the time of this report, there has been no response from the employer.

III. RECOMMENDATION ON PETITION FOR RECONSIDERATION

It is respectfully recommended that the Appeals Board grant the Petition for Reconsideration and amend my general Award to include the specific dollar amount requested by the petitioner.

DATE: 08-18-2021

Lynn Devine
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

JUDGES REPORT ON AMENDED PETITION FOR RECONSIDERATION

I.
INTRODUCTION

1. Findings of Fact and Order: 08/01/2021 service 08/02/2021
2. Identity of Petitioner: Applicant
3. Verification: yes
4. Timeliness: Timely
5. Date Petition for Reconsideration filed: 08/24/2021
6. Petitioner has filed an Amended Petition for Reconsideration, without contention of error in the decision, but renews contention that the Award should have issued in a monetary amount certain in the sum of $537,449.36. Petitioner also asks that the name of the defendant in the award be change to conform to the corporation certificate reflect Mac Kenzie Electric Inc.

II.
FACTS and DISCUSSION

Previously petitioner filed his Petition for Reconsideration on 08/12/2021. No response was received from defendant. The undersigned issued her report on 08/18/2021 recommending the Appeals Board grant Reconsideration.

On 08/24/2021 petitioner filed an Amended Petition for Reconsideration, renewing the appeal for a set dollar amount and requesting a name change of defendant from MacKenzie Electrical Inc. to Mac Kenzie Electric Inc. It is noted that the caption automatically populates in EAMS as MacKenzie Electrical Inc. and this has been the case since 2011 when Judge Keyson issued her awards in the case in chief.

This name change would appear to be appropriate on the history of the case. The undersigned believes that the name change does not warrant a Petition for Reconsideration but is simply a clerical correction to the Award issued on 08/02/2021.

III.
RECOMMENDATION ON AMENDED PETITION FOR RECONSIDERATION

As this matter is now before the Appeals Board, I recommend that the Award be reissued in the correct name of the employer Mac Kenzie Electric, Inc.

DATE: 08/30/2021

Lynn Devine
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

JUDGES REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

1.	Findings & Order:	08/01/2021
2.	Identity of Petitioner:	Employer
3.	Verification:	The petition is verified
4.	Timeliness:	The petition is timely
5.	Date Petition for Reconsideration filed:	08/27/2021

6. Defendant contends reconsideration should be granted in that this judge 1) erred by acting in excess of her powers; 2) the decision was procured by fraud; 3) the evidence does not justify the findings; 4) defendant has discovered new evidence material to the decision that could not have been discovered with reasonable diligence and produced at hearing; 5) the findings of fact do not support the decision.

II. FACTS

This case began in October 2001 when the applicant was injured in a backhoe accident. Despite the obvious injury State Compensation Insurance Fund denied the injury. Litigation commenced year after year and eventually came to the desk of Judge Deborah Keyson some 11 years later who presided over the first trial and discovery disputes commencing in 2011. During that time there were multiple appeals and additional discovery in attempts to finalize the case. After returning from reconsideration in 2017 Judge Keyson had retired and the case was reassigned to Judge Glass.

During the pendency the retroactive benefit issues were resolved By Compromise and Release with SCIF on December 18, 2017. Judge Glass later retired and the case was reassigned to the undersigned.

The case in chief remained unresolved until December 10, 2018 when it resolved by a stipulated award to 100% by SCIF.

The case next came before me 20 years later on December 03, 2021 for trial on the Serious and Willful. After completion of the issues and evidence the applicant was having problems getting onto the Lifesize platform and the matter was continued to February 25, 2021. This hearing was held and testimony was given by the applicant then continued to May 06, 2021. On May 06, 2021 the hearing concluded. On August 01, 2021 the Decision issued.

On August 12, 2021 applicant's attorney filed his first petition for Reconsideration and the Report on Reconsideration issued on August 18, 2021. An second amended Petition was then filed by

applicant's attorney on August 24, 2021. The undersigned really believes this to be more of a clerical correction request.

Then on August 27, 2021 defendant filed this Petition for Reconsideration. On September 10, 2021 applicant filed an Answer to defendants Petition for Reconsideration.

Over the 20 years of this case nothing has been decided by a judge without an appeal or two for each decision.

III.
DISCUSSION

STANDARD OF CONDUCT

Petitioner begins by defining the legal standard that in order to show serious willful misconduct the employee must show that the employer 1) knows of the dangerous condition 2) knows that the consequence of its continuance will involve serious injury to the employee and 3) deliberately fails to take corrective action.

Petitioner for defendant then proceeds to examine case law which she determines to be essential to the analysis. Her first citation is to *Mercer Fraser Co v IAC* (Soden) (1953) 18 CCC 3 sites to the language from that decision that the knowledge is the actual nature coupled with a conscious failure to act. She then goes to the parts of the Supreme Court pulling language from the same case that it must be beyond gross negligence and that the willful misconduct actually be an actual intent to harm or death or act with disregard of the consequences of their failure to act *Mercer Fraser Co v IAC* (Soden) (1953) pages 11-12.

Petitioner for defendant then cites to *Hawaiian Pineapple Co., LTD v IAC* (Churchill) (1953) 18 CCC 94 as according that decision that the conduct must speak to causation must be active disregard of the consequences it must be an affirmative and knowing disregard of the consequences.

Petitioner then accounts the facts in the Soden case then they Churchill case. Counsel then departs to *Ferguson v WCAB* (1995) 60 CCC 275 in support of the language that:

> "an act deliberately done for the express purpose of injuring another or intentionally performed whether with knowledge the serious injury is probable result or with positive active wanting reckless and absolute disregard of its possible damaging consequences."

From this point petitioner for the employer attempts to support an argument that the employer did not know of any previous injuries and ergo did not know the equipment is hazardous.[1] This is not true, the jobsite foreman Chris Baumann knew.

[1] American Smelting and Refining Co. v WCAB

This goes to her support that the testimony of Joe Walburn during trial claimed there were no prior accidents known to have occurred with this backhoe due to brake failure.[2] Not good enough because Chris Baumann knew, Chris Baumann was the designated site foreman who actually ran the job on a day to day basis. Applicant consistently reported to and took directions from Chris Baumann including instructions that ultimately resulted in his injuries.

The backhoe that Mr. Walburn testified to and all the backhoe exhibits reference a John Deere Model 310 not the 710 that applicant was driving at the time of the injury. Not only was the equipment faulty it was reported more than once to Chris Baumann, the worksite foreman, who reportedly had the backhoe inspected. Whether it was done of not we don't know as Chris Baumann has disappeared and the only one who was actually there was the applicant.

APPLICANT FAILED TO ESTABLISH CORPORATE LIABILITY

Next petitioner for the employer seeks to the shift liability claiming the applicant did not comply with the employers establish safety procedures, referencing Exhibit 3, thereby negating any liability for the serious and willful. Counsel for the employer cites to an unpublished case that is not reviewed and the court is familiar with the exhibit cited. It will not support the petitioner's effort at shifting of liability where the foreman, Chris Baumann gave applicant the order as to what to do and exactly how to do it. It was this conduct that ultimately injured the applicant.

On the facts as presented in this case the applicant's version of the events is historically more consistent over the course of this litigation although petitioner expended tremendous effort at grilling the applicant's memory over his deposition testimony several years ago.

The court would like to point out to the reviewing court that the applicant injuries resulted in some cognitive issues.

It was evident to the court over the days of testimony and review of the extensive evidence that the foreman's orders to the applicant to dig the trench, on the incline using the steel plates on the incline and to deploy the stabilizers on the steel plates was an order to act in an unsafe manner after having been informed of the dangers of using the backhoe in this manner. This was reckless and absolute disregard of the possible consequences.

Mr. Walburn easily admitted what the applicant was ordered to do by the foreman was unsafe and he never accounted for the presence of the steel plates in this particular part of the project. Mr. Walburn had attempted to testify that there was no incline, it was flat. Clearly Pepperdine University is built on an incline and occupies a large hill. Mr. Walburn did not make a report to OSHA about the accident and didn't arrive at the injury site until several hours after the accident and then took only cursory information from Chris Baumann, never speaking to the applicant after the injury. SCIF denied the injury based on an employer level investigation. I did not find Mr. Walburn credible in his recitation of the facts.

Petitioner believes the applicant's facts are unsupported by the record but this is only if you believe Joe Walburn's testimony. Mr. Walburn's testimony is not fact, it is view of what happened 20

[2] Trial transcript page 25;5-10.

years ago. As to Mr. Walburn's statement that he would never have instructed the applicant to dig a trench in the manner that was done is not relevant because his site foreman did exactly that because the applicant had informed Chris Baumann of the danger involved.

DEFENDANT'S ALLEGATIONS OF FRAUD IS NOT SUPPORTED

Petitioner claims the applicant was coached by his attorney according to the declarations of Joe Walburn and Denis MacKenzie. Petitioner contends this took place at the hearing on 02/25/2021 when parties were off the record. This judge did not hear this alleged conversation. It was not brought to the court's attention until this appeal. Petitioner chose to keep this to herself when as an officer of the court she should have brought this misconduct allegation to the attention of the court and built a record so the court could make an inquiry. The petitioner did not raise it at the last trial proceeding on May 06, 2021, no she waited until the last date of the period of Reconsideration to what end I don't know.

The undersigned believes she has sat on her client's rights to disclose any misconduct on the part of the applicant and his attorney. This therefore is not new evidence and is not subject to any discovery exception as it was not raised in a timely and appropriate fashion. I find this point raised at this time by petitioner is a spurious allegation, untimely raised, by witnesses who have a vested interest in doing anything they can to disrupt proceedings.

Petitioner again seeks to offload all responsibility onto Chris Baumann and then distance the corporation from the actions of their man on site, the foreman Chris Baumann, to permit this would result in never being able to hold the owners of the contracting company liable for anything on the jobsite. This is not what the law intended.

DEFENDANT'S CONTENTION THEY WERE DENIED DUE PROCESS

Petitioner again decries the delays[3] and failure to hold in person hearings on this case. This was addressed before trial commenced in Lifesize format. Again in order to believe defendant's evidentiary presentation would mean having to ignore decades of evidence and testimony of the applicant to the contrary. For instance the seatbelt issue. Defendant has consistently tried to present a John Deere 310 as the offending vehicle it was not.

When the call was made to the union of operating engineers defendant specifically requested someone qualified to operate a John Deere 710 with John Deere controls.[4] The 710 at the job site did not have an enclosed cab or a seatbelt at that time of the accident.

Petitioner then indulges in a flight of all the things that should have, could have been done. Petitioner believes that her evidentiary presentation would have been more effective in person. Since we did not have that option I am of the mind that Lifesize was the next best thing and quite honestly the majority of the time the only one with visuals were the attorneys and the witness so I don't think the confrontation petitioner envisioned and hypothesized about was anywhere near as important to the court.

[3] At some point defendant must acknowledge their responsibility in maintaining denial of the claim for 17-18 years.
[4] Exhibit 159

Petitioner appears to accuse the court of bias because the court asked questions at one point. This was not "shedding the mantle of impartiality" but quite candidly sometimes the attorneys appeared to be groping in the dark going no where helpful to the adjudication.

Another troubling point is the defendant's production of documents without foundation all in support of a different backhoe than the one that injured the applicant.

Petitioner decries again not being able to perform in person. If I could make Covid disappear I would do so in a heartbeat but quite candidly we will not be able to return to a pre Covid world at any point in the near future and it is truly pointless to rest on that as a reason to invalidate proceedings and start over with a new judge.

RELIANCE ON EVIDENCE

Finally, petitioner claims the court did not decide on the admitted evidence in this matter. That is rediculous it is defendant's evidence that is suspect as to the lack of substantiality.

Petitioner attacks the applicant's reference to paper during proceedings on February 25, 2021 and claimed to have made a motion for disclosure that was never ruled upon. The motion was never filed but a trial brief 5 was filed by petitioner on April 01, 2021 compelling production of the papers applicant was using to refresh his recollection on February 25, 2021. Apparently this dispute dated back to the beginning of the case. There was not order attached with regard to compelling the applicant to disclose the documents or if they infact had already been provided to counsel. Petitioner did make efforts to set yet another deposition of the applicant on February 08, 2021 during the pendency of proceedings.

On April 24, 2021 applicant's attorney filed an answer to the trial brief of petitioner outlining the evidence code procedures to be followed. Since it was filed under correspondence it was not reviewed until preparation of this report. Regardless at the subsequent hearing on May 6, 2021 the issue was never raised again.

CHRIS BAUMANN'S ACTIONS WERE NOT THOSE OF THE PRINCIPALS

Petitioner again reiterates claims that Chris Baumann's actions could not be attributed to the corporation. It is also claimed that the brakes were not reported as having problems such as slippage before they fully failed coupled with the improper use of steel plates. I don't believe that to be true.

Petitioner again launches on how Lifesize denied her client's due process. Due process is notice and opportunity to be heard. Defendant had due process. It is only in criminal proceedings that there is a right to confront and even in criminal hearing are sometimes held by remote viewing these days. Petitioner's counsel cannot be so obtuse as to the dangers her contention presents for the public, the court and parties but it does show the no holds barred position taken during the course of proceedings.

Petitioners last salvo is her contention that the "coaching" evidenced by the declarations of Patrick MacKenzie and Denis MacKenzie are "newly discovered" strains credulity and is spurious. This was known to petitioner on February 25, 2021 but not brought forth until this appeal. If anything this supports the credibility problems with the "evidence" by defendant.

IV.
RECOMMENDATION ON PETITION FOR RECONSIDERATION

I recommend that reconsideration be denied. After just a few years dealing with this case I have formed an opinion as to the evidence and do not find the defendant's evidence to be substantial. I welcome the overview and instruction of the Appeals Board in this matter.

DATE: 09-15-2021

Lynn Devine
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE