WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JANINE CALVIN, *Applicant,* **vs.** **ELINGS PARK FOUNDATION; OAK RIVER INSURANCE COMPANY, administered by, BERKSHIRE HATHAWAY HOMESTATE,** ***Defendants.***	**Case No. ADJ8949345** **(Oxnard District Office)** **ORDER DENYING PETITION FOR RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

We are, moreover, extending to the WCJ's finding on credibility the great weight to which it is entitled. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].)

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For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE ZALEWSKI

I CONCUR,

RONNIE G. CAPLANE

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUL 22 2014

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

JANINE CALVIN
STOUT & KAUFMAN
BRADFORD & BARTHEL

jp

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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JANINE CALVIN, Applicant, vs. ELINGS PARK FOUNDATION and OAK RIVER INSURANCE COMPANY ADMINISTERED BY BERKSHIRE HATHAWAY HOMESTATE COMPANIES , Defendants.	Case No. ADJ8949345 **ANSWER TO APPLICANT'S PETITION FOR RECONSIDERATION**

COMES NOW, defendants, Oak River Insurance Company administered by Berkshire Hathaway Homestate Companies (defendant), by and through their attorneys of record, the Law Offices of Bradford and Barthel, and hereby respectfully submits this Answer to Applicant's Petition for Reconsideration on the following grounds:

A) That the evidence does justify the findings of fact;

B) That the findings of fact do support the order, decision, or award; and

C) That the opinion and findings of fact do constitute substantial evidence.

STATEMENT OF FACTS

Applicant claims to have suffered injury to her neck, upper back, head, bilateral shoulders, arms, elbows wrists, hands and fingers on March 31, 2013, arising out of and in the course of her employment as a receptionist for Elings Park Foundation. (Minutes of Hearing (MOH), 03/25/2014, 2:3-5). On that Sunday, applicant claims she was standing on a board to

reach a flag in a flag holder. (Id., 3:8-9). She claimed the board shifted as she was doing so, causing her to move forward and strike her head on the post. (Id., 3:10-11). According to the applicant no one was present the day of the injury and applicant went home. (Id., 3:12). It did not occur to her to call her supervisor. (Id., 4:8-9). Park hosts, employees who live at the park in exchange for 25 hours of volunteer service, were present that day. (Id., 6:4-8). Employees had been told to report to management in case of an injury. (Id, 6:4-5). All of applicant's supervisors were available if applicant needed to report to them. (Id, 6:6). Applicant could not recall if she turned in any hours for that day. (Id., 4:9).

Applicant failed to report the injury until that Tuesday after the alleged injury. (MOH, 03/25/2014, 3:13-14). Applicant first sought treatment with a Dr. Kim. (Id., 3:15). Dr. Kim told her she had whiplash. (Id., 3:17). Applicant sought treatment from three other doctors as well. (Id., 3:16-17). She had pain in her neck, along with numbness, radiating into her hand. (Id., 3:18-20). She claimed not to have filed the claim in retaliation for being terminated. (Id., 3:21-22).

Although applicant had originally been hired as a park host, she was not working out. (MOH, 03/25/2014, 5:19-20, 6:7-8). Her personality was not a good fit at the park or at the tennis court. (Id., 5:20). Marinella Baker, the director of operations, moved the applicant around to try and find a fit. (Id., 5:21-22). The receptionist job was more of a customer service position and applicant was not meeting the requirements of the job. (Id., 5:22-23). Ms. Baker told applicant about her termination the week of the alleged injury. (Id., 5:24). However, applicant continued to work up until the date of the alleged injury. (Id., 6:1).

Applicant had lived at the park. (MOH, 03/25/2014, 6:9). Mr. Baker asked the applicant to leave the park after her termination but the applicant required time to move her trailer. (Id., 6:11-12).

Both Mr. Baker and another supervisor, Christina, understood the applicant to say she had been taking the flag down, not putting it up when the alleged injury occurred. (MOH, 03/25/2014, 6:14-15). Applicant complained of symptoms and bruising however Ms. Baker

saw nothing upon visible inspection and the scar on applicant's nose was pre-existing. (Id., 6:15-17).

PROCEDURAL HISTORY

The matter proceeded to trial on March 25, 2014 before workers' compensation judge (WCJ) William Carero. The only issue for trial was whether applicant's alleged injury arose out of and occurred in the course of applicant's employment. Defendant offered into evidence records of Sansum Clinic. (MOH, 03/25/2014, 2:21-23). Applicant objected to admission of those records and WCJ Carero noted he would defer the question of admissibility of those records. (Id., 2:23-25).

WCJ Carero issued his Findings and Order on May 19, 2014. He found applicant did not sustain injury AOE/COE to her neck, upper back, head, bilateral shoulders, arms, elbows, wrists, hands or fingers. (Findings and Order, 05/19/2014, p. 1). He also found defendant's only exhibit, the records of Sansum Clinic, to be admissible. WCJ Carero then ordered that applicant take nothing with regard to her claim. (Id., p. 2).

In his Opinion on Decision, the WCJ considered the demeanor of both applicant and employer witness, Ms. Baker. (Opinion on Decision, 05/19/2014, p. 2). WCJ Carero found it illogical applicant would be asked to set up a tennis court in the rain due to a reservation but without anyone present to whom applicant could report an injury. (Id.). This was compounded by the fact applicant failed to report the injury when she called in to advise she would not be reporting to work or even the next day. (Id.). Furthermore, the mechanism of injury seemed inconsistent with injury to all of the body parts claimed. (Id.).

Applicant filed a timely and verified Petition for Reconsideration on June 4, 2014.

QUESTIONS PRESENTED

1. Whether applicant's Petition for Reconsideration should be dismissed for failure to comply with California Code of Regulations, title 8, section 10842?
2. Whether applicant met her burden of proof on the issue of AOE/COE?

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ARGUMENT

I. APPLICANT'S PETITION FOR RECONSIDERATION SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH CALIFORNIA CODE OF REGULATIONS, TITLE 8, SECTION 10842.

Applicant's Petition for Reconsideration should be dismissed for its failure to comply with Title 8, California Code of Regulations, section 10842. Since November 17, 2008, Rule 10842(b) has provided, "Each petition for reconsideration, removal, or disqualification, and each answer thereto, shall support its evidentiary statements by specific references to the record," with specific instruction as to how to refer to documents in the record. (Cal. Code Regs., tit. 8, § 10842(b)). Section 10842(b) states in relevant part,

> (b) Each petition for reconsideration, removal, or disqualification, and each answer thereto, shall support its evidentiary statements by specific references to the record.
> (1) References to any stipulations, issues, or testimony contained in any Minutes of Hearing, Summary of Evidence, or hearing transcript shall specify: (A) the date and time of the hearing; and (B) if available, the page(s) and line number(s) of the Minutes, Summary, or transcript to which the evidentiary statement relates.
> (2) References to any documentary evidence shall specify: (A) the exhibit number or letter of the document; (B) the date and time of the hearing at which the document was admitted or offered into evidence; (C) where applicable, the author(s) of the document; (D) where applicable, the date(s) of the document; and (E) the relevant page number(s) and, if available, at least one other relevant identifier (e.g., line number(s), paragraph number(s), section heading(s)) that helps pinpoint the reference within the document.

Throughout her Petition for Reconsideration, applicant makes reference to specific facts and pieces of evidence, but fails to provide specific reference to any evidence consistent with Rule 10842(b)(1) and (2). With the exception of applicant's reference in her statement of facts to three pages in the medical records, applicant's argument is devoid of any specific citation to the record upon which she relies. Neither defendant nor the WCAB should have to hunt and seek through the record to ascertain the veracity of applicant's factual assertions.

Furthermore, applicant's statement of facts is far from a fair statement as required by Regulation 10842(a). Applicant's petition fails to set forth all of the material evidence and

utterly fails to make mention of the WCJ's reasoning behind his decision. Applicant fails to make any mention of the testimony of the employer witness Ms. Marinella Baker and discuss its impact on applicant's claim. Applicant likewise fails to discuss this testimony in her argument or offer any effort to rebut it.

Rule 10846 authorizes the Appeals Board to deny or dismiss a Petition for Reconsideration "if it is unsupported by specific references to the record and to the principles of law involved." (Cal. Code Regs., tit. 8, § 10846). Although the record here is not voluminous, it is essential that a party follow this rule and give full citations to the record, to ease the WCAB's burden in finding the documents cited. Applicant's argument also fails to make any reference to any legal authority. Her entire argument is completely devoid of any statutory or case law authority whatsoever. (Petition for Reconsideration, 06/04/2014, pp. 3-5). A party complaining of a particular judgment must provide argument and legal authority for the positions taken. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.'" (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862 [91 Cal.Rptr 3d 726]). A reviewing court is "not bound to develop appellants' arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived." (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 [79 Cal.Rptr.3d 588]; *see also Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2 [87 Cal.Rptr.2d 654, 981 P.2d 499]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [42 Cal.Rptr.2d 543, 897 P.2d 481]). By virtue of applicant's failure to cite to any legal authority, she has waived her right to complain of the decision.

Finally, failure to comply with the Rule 10842 is similar to a failure to comply with California Rule of Court 8.495, when filing a Petition for Writ of Review. In *Nielsen v Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 923, 50 Cal.Comp.Cases 104, the Court, ruling on California Rule of Court 57(a) (an earlier version of rule 8.495), noted the petitioning party was required to fairly state all the material facts, and if not done, a writ

should not even issue. The court went even further in *Western Aggregates Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290–291, 130 Cal.Rptr.2d 436, stating that a lack of a fair statement of facts forfeits evidentiary claims, and "appellate counsel should be vigilant in providing us with effective assistance in ferreting out all the operative facts." Here, applicant makes reference to items that are not part of the record. (Petition for Reconsideration, 06/04/2014, 4:1-3). Reference to items not part of the record is inherently unfair. Given the lack of a fair statement of facts that is based on the entire record and admitted evidence the Board should deny the petition in keeping with the above noted regulation. Based on the above violations, applicant's petition should be dismissed.

II. THE WCJ PROPERLY CONCLUDED APPLICANT FAILED TO MEET HER BURDEN OF PROOF ON THE ISSUE OF CAUSATION.

Applicant's main argument (barely a page and a half) is that her lack of immediate reporting can reasonably be explained by the circumstances and that the injury is supported by the medical evidence. (Petition for Reconsideration, 06/04/2014, pp. 3-4). An applicant for workers' compensation benefits has the burden of establishing a "reasonable probability of industrial causation" (*McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [445 P.2d 313, 71 Cal.Rptr. 697, 33 Cal.Comp.Cases 660]) "by a preponderance of the evidence." (Lab. Code § 3202.5). Labor Code section 3202.5 states:

> All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. 'Preponderance of the evidence' means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence. (*Lab. Code* § 3202.5).

Thus, "'[a]lthough the employee bears the burden of proving that his injury was sustained in the course of his employment, the established legislative policy is that the Workmen's Compensation Act must be liberally construed in the employee's favor . . . and all reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee.' [Citation.] This rule is binding upon the board and this court." (*Lamb v.*

Workmen's Comp. Appeals Bd. (1974) 11 Cal.3d 274, 280 [113 Cal. Rptr. 162, 520 P.2d 978]). Nevertheless, these principles do not relieve the applicant of the burden of establishing the relevant facts by a preponderance of the evidence. (*Fleetwood Enterprises, Inc. v. Workers' Comp. Appeals Bd.* (2005) 134 Cal.App.4th 1316, 1323 [37 Cal.Rptr.3d 587, 70 Cal. Comp. Cases 1659]; Lab. Code § 3202.5).

In meeting that burden, a party must provide evidence that is substantial. The definition of "substantial evidence" is well-established. The term "substantial evidence" means evidence "which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . It must be reasonable in nature, credible, and of solid value." (*Insurance Co. of North America v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 905, 910 [176 Cal.Rptr. 365]; *Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54]).

Here, applicant contends that she met that burden of proof by showing she was at work setting up the tennis court and that she was injured while doing so. (Petition for Reconsideration, 06/04/2014, p. 3). However, that is not the end of the inquiry. The applicant simply was not a credible witness. In addition to making several references to evidence not in the record, as discussed above, applicant's testimony was contradictory as noted by the WCJ

Although applicant's initial treatment records note a similar story as she testified to at trial, (Subpoenaed Records of Goleta Valley Cottage Hospital, report dated 04/05/2013, p. 1 [Board Ex. X admitted on 03/25/2014]), those records are also internally inconsistent. In the April 5, 2013 report, applicant denied a loss of consciousness. (Id.). Yet, in the report of the CT scan performed the same day, loss of consciousness was reported. (Id., CT of Brain dated 04/05/2013). Interestingly, no evidence of posttraumatic injury was noted. (Id.). One would certainly expect to see evidence of that given the mechanism of injury and applicant's description of symptoms. Likewise, the CT scan of the neck did not reveal any significant pathology. (Id., CT of Cervical Spine dated 04/05/2013).

Applicant had been instructed on how to report an injury. (MOH, 03/25/2014, 6:5). Staff was available, yet applicant chose not to report the injury the day of the alleged incident.

(Id., 6:5-6). When she chose not to report to work the next day, she had another opportunity to report the alleged injury, but chose not to do so. (Id., 4:14-15). It should be noted that applicant was living on the premises. (Id., 7:14-15). Thus, not only was her job threatened by the looming termination, but her place of abode was as well. All of this would serve as potential motive to claim an injury that did not occur. Applicant's testimony was entirely self-serving and the specter of secondary gain is clearly invoked by these facts.

Faced with all of this evidence, the WCJ "considered the demeanor of both witnesses and evaluated the content of their testimony." (Report and Recommendation, 06/06/2014, p. 2). The trier of fact is the exclusive judge of the credibility of the evidence and can reject evidence as unworthy of credence. (*Oldenburg v. Sears, Roebuck & Co.* (1957) 152 Cal.App.2d 733, 742 [314 P.2d 33]; *Hicks v. Reis* (1943) 21 Cal.2d 654, 659–660 [134 P.2d 788] [trial court is entitled to reject in toto the testimony of a witness, even if that testimony is uncontradicted]). Although the Board is entitled to reject the trial judge's findings on credibility matters if substantial evidence supports contrary findings, the degree of substantiality required to sustain the board in such cases should be greater than that afforded by the evidence relied upon herein.

The evidence herein is not one which a reasonable trier of fact would find credible or of sufficient weight. It is indeed only a scintilla of proof having little probative value in determining the threshold question at issue. Here, the WCJ properly rejected applicant's testimony based on the considered weighing of the evidence.

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CONCLUSION

Based on the above, defendant respectfully requests that applicant's Petition for Reconsideration be dismissed.

Dated: June 19, 2014

Respectfully submitted,

Bradford & Barthel, LLP

By: _____
LOUIS A. LARRES
Attorneys for Defendants

VERIFICATION

STATE OF CALIFORNIA)

) ss.

COUNTY OF FRESNO)

I have read the foregoing ANSWER TO APPLICANT'S PETITION FOR RECONSIDERATION and know its contents.

I am an attorney for a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I am informed and believe that they are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 19, 2014, at Fresno, California.

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PROOF OF SERVICE
(C.C.P Section 1013a, 2015.5)

STATE OF CALIFORNIA)

) ss.

COUNTY OF VENTURA)

RE: JANINE CALVIN VS. ELINGS PARK FOUNDATION
Claim No.: 22022419
Our File No.: 0117. 061562

I, David Tringali, am a citizen of the United States and am employed in the county of the aforesaid; I am over the age of 18 years and not a party to the within action; my business address is 1300 East Shaw Avenue, Suite 171, Fresno, California 93710.

On June 19, 2014, I served the within document(s) described as:

ANSWER TO APPLICANT'S PETITION FOR RECONSIDERATION

on the interested parties in this action as stated on the attached mailing list.

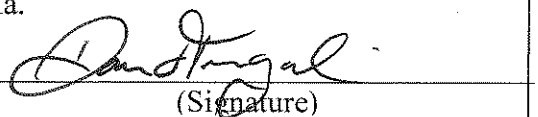
☒ (ORIGINAL) Filed Electronically via EAMS.

☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Fresno, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I, the undersigned, declare under penalty of perjury that the foregoing is true and correct.

Executed on June 19, 2014, at Fresno, California.

David Tringali
(Type or print name)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