

493

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

Case Nos. ADJ8458607
(San Jose District Office)

GENARO MIRAMONTES,

Applicant,

vs.

RIVERDOG FARMS; CRUM FOSTER,

Defendants.

ORDER DENYING
PETITION FOR
RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of 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.

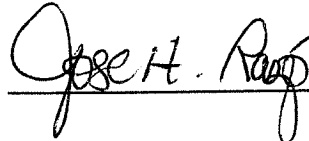
We have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

///
///
///
///
///
///
///
///
///
///

1 For the foregoing reasons,

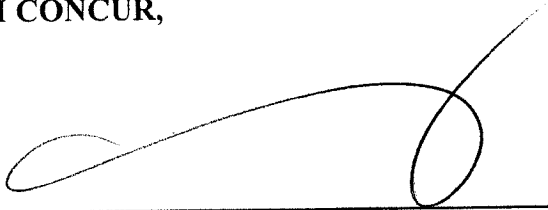
2 **IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

3 **WORKERS' COMPENSATION APPEALS BOARD**

4
5 

6
7 **JOSÉ H. RAZO**

8 **I CONCUR,**

9
10 

11 **MARGUERITE SWEENEY**

12 **CONCURRING, BUT NOT SIGNING**



14 **DEIDRA E. LOWE**

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

16 **JUL 28 2015**

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

19 **BRADFORD AND BARTHEL**
20 **GENARO MIRAMONTES**
21 **LAW OFFICE OF MANUEL REYNOSO**

22 *Received By* BRADFORD & BARTHEL, LLP
23 **JUL 30 2015** **JUL 30 2015**
24 *Bradford Barthel San Jose* **MICHAEL P. BURNS**

25
26
27 **ebc** 

1 Michael P. Burns, Esq. State Bar No.: 239863
LAW OFFICES OF
2 Bradford & Barthel, LLP
BRADFORD BARTHEL SAN JOSE
3 2841 Junction Avenue, Suite 114
San Jose, California 95134
4 Telephone: (408) 392-8202
Facsimile: (408) 392-0903

5 Attorneys for Defendants
6 United States Fire Insurance Company (one of the Crum & Forster group of
companies)
7

8 **WORKERS' COMPENSATION APPEALS BOARD**

9 **STATE OF CALIFORNIA**

10 GENARO MIRAMONTES,

Case No. ADJ8458607

11 Applicant,

12 vs.

**DEFENDANT CRUM & FORSTER'S
ANSWER TO APPLICANT'S PETITION
FOR RECONSIDERATION**

13 TIMOTHY MUELLER & KATHERINE
CAMPBELL DBA RIVERDOG FARM and
14 UNITED STATES FIRE INSURANCE
COMPANY (ONE OF THE CRUM &
FORSTER GROUP OF COMPANIES),

15 Defendants.
16

17 **I. INTRODUCTION**

18 COMES NOW, Defendant United States Fire Insurance Company (one of the Crum &
19 Forster group of companies), by and through their attorney of record, Bradford & Barthel, LLP
20 with this Answer to Applicant's Petition for Reconsideration dated 6/8/2015.

21 The WCJ's decision denying Applicant's petition for a QME panel in psychology is
22 correct and should be upheld. It is undisputed that Applicant was not employed by Timothy
23 Mueller & Katherine Campbell dba Riverdog Farm (hereinafter, "Riverdog Farm" or "the
24 Farm") for at least six months. The sole issue at trial was whether Applicant's injury, which
25 was caused by stepping into a hole while working on this rural farm, was a "sudden and
26 extraordinary" event.
27
28

1 Defendant presented credible evidence that Riverdog Farm is a rural, uneven parcel of
2 farmland, and holes (caused by burrowing squirrels) are ubiquitous on the property. The WCJ
3 correctly ruled that the mechanism of injury, while arguably sudden, was not “extraordinary.”
4 She noted that the employer, Timothy Mueller, testified credibly that the number of holes
5 caused by squirrels is large, that other employees have stepped in holes, and that the holes are
6 not as deep as Applicant claimed.

7 The facts and law show that Applicant did not meet his burden of proof, and his
8 Petition should be denied.

9 II. FACTS

10
11 Riverdog Farm is located on 450 acres near Guinda, a rural town. (Minutes of Hearing
12 and Summary of Evidence, 5/14/15, p. 5:17-19.) The Farm is mixed use and grows fruit, nuts,
13 and vegetables, as well as raising some livestock. (Id. at p. 5:11-12.)

14 The land is very uneven and is surrounded by wilderness. Wild animals, including
15 pigs, deer, rodents and ground squirrels are present. (Id. at p. 5:17-19.) The ground squirrels
16 create burrows, in which they live. The holes they create can be nine inches in diameter and
17 up to a foot deep, although most are smaller. (Id. at p. 5:26-27.) Holes are common at the
18 farm, and there are hundreds of squirrel holes around the Farm’s perimeter. (Id. at p. 5:29-30.)
19 Mr. Mueller testified that these holes are common and get stepped into frequently. (Id. at p.
20 6:12-15.)

21 Applicant was employed by Riverdog Farm for less than six months at the time of his
22 injury. (Id. at p. 4:26-27.) He was employed as an irrigator, but also assisted in weed
23 abatement and picking crops. (Id. at p. 5:32-35.) Weed abatement is performed twice in the
24 spring, and Applicant was assigned to cut weeds on the date of his injury. (Id. at p. 5:21; 33-
25 36.) Applicant used a weed whacker to cut the weeds. (Id. at p. 3:42-43.) He admitted he had
26 not seen the entire farm while working there, which he described as big. (Id. at p. 4:29-30.)

27 Applicant testified that he injured his back when he stepped in a hole that was two feet
28 deep while cutting weeds. (Id. at p. 4:10-11.) On the day of the injury, however, Mr. Mueller

1 found what he thought was the most likely hole, which was six to nine inches wide and one
2 foot deep. (Id. at p. 5:42-45; p. 6: 1-7.) Even though there was upright green grass around the
3 hole, one can still see the terrain. (Id. at p. 7:4-7.) This was, to his knowledge, the first injury
4 from stepping in a hole. (Id. at p. 6:25-27.)

6 III. ARGUMENT

7
8 The WCJ correctly concluded that Applicant did not meet his burden of proof that the
9 injury—while sudden—was not “extraordinary.” She judged Mr. Mueller’s testimony as
10 credible and more persuasive than Applicant’s testimony. She also correctly held that while
11 most injuries are sudden, to show that an injury is “extraordinary” is a higher threshold, and
12 one that Applicant did not meet.

13 Labor Code §3208.3(d) provides that “no compensation shall be paid pursuant to this
14 division for a psychiatric injury related to a claim against an employer unless the employee has
15 been employed by that employer for at least six months. . . . This subdivision shall not apply if
16 the psychiatric injury is caused by a sudden and extraordinary employment condition.”

17 The sudden and extraordinary employment condition exception in Labor Code
18 §3208.3(d) “encompasses the type of events that would naturally be expected to cause psychic
19 disturbances even in a diligent and honest employee.” State Compensation Ins. Fund v.
20 Workers' Comp. Appeals Bd. (Garcia) (2012) 204 Cal.App.4th 766, 772, citing Wal-Mart
21 Stores, Inc. v. Workers' Comp. Appeals Bd. (2003) 112 Cal.App.4th 1435, 1441.

22 In Garcia, Applicant fell from a ladder while picking avocados from a tree. The injury
23 was not sudden and extraordinary because “[i]t did not occur in a public area or in an area
24 shielded from the typical hazards of his occupation.” (Id. at 773.) Rather, it occurred “in the
25 avocado grove where Garcia and his co-workers were picking fruit from high trees while
26 standing on tall ladders.” (Id.) The court concluded that “[a] fall under these circumstances
27 cannot be described as an uncommon, unusual and totally unexpected occurrence.” (Id.)
28

1 The court noted that the burden is on Applicant, not Defendant, to show that the event
2 was sudden and extraordinary. The Garcia court held that Applicant’s “observations during
3 his brief employment at Cole Ranch and his prior unspecified fruit-picking experiences do not
4 establish his injury was caused by an event that was uncommon, unusual and totally
5 unexpected.” (Id. at pp. 774-75.) Moreover, there was no evidence the employer violated any
6 safety regulations. (Id. at p. 775.)

7
8 Other cases have similarly restricted finding an injury to be “extraordinary.” (See, e.g.,
9 Pound v. Workers' Comp. Appeals Bd. (2014) 80 Cal. Comp. Cases 50 (non-panel decision,
10 writ denied) (car salesman’s injury occurred when legs were tangled in balloon string, causing
11 a fall, was not sudden and extraordinary because it was not uncommon to find balloons on
12 strings around car lots and the injurious event experienced by Applicant was not the type of
13 event that would be expected to cause psychic disturbances in a diligent, honest employee);
14 Aresco v. Workers' Comp. Appeals Bd. (2014) 79 Cal. Comp. Cases 1188 (non-panel decision,
15 writ denied) (injury to maintenance worker who contracted Guillain-Barre Syndrome while
16 employed at animal theme park was not sudden and extraordinary; there was nothing unusual,
17 uncommon, or unexpected with respect to the work activities that caused Applicant’s injury);
18 Alves v. Workers' Comp. Appeals Bd. (2014) 79 Cal. Comp. Cases 430 (non-panel decision)
19 (writ denied) (injury not sudden and extraordinary where Applicant was employed as a
20 carpenter/construction worker and was injured by a falling truss; this type of injury is not out
21 of the ordinary for Applicant’s type of employment, the Applicant was not in a public area);
22 Bayanjargal v. Workers' Comp. Appeals Bd. (2006) 71 Cal. Comp. Cases 1829, 1830–1831
23 (writ denied) (roofer’s fall was not extraordinary and it was not “objectively reasonable to
24 conclude that the risk of such injury was outside the ordinary risks and hazards of his
25 occupation as a roofer.”); Romero v. California Ins. Guarantee Assn. (2005) 33 Cal. Workers'
26 Comp. Rptr. 75 (an electrician employee’s fall from a 12-foot ladder while installing a cable
27
28

1 was not extraordinary because “falling from a ladder is not highly unusual, or outside of the
2 ordinary.”)

3 At Trial, Mr. Mueller’s credible testimony established that Riverdog Farm is a rural
4 farm, with animals such as squirrels creating holes all over the farm. The terrain is uneven, as
5 one would expect on a rural farm. Moreover, Applicant, as part of his job, was required to
6 work in weed abatement, and therefore had to walk on the farm property.

7 The mechanism of injury—stepping in a hole on a rural farm while performing farm
8 labor—cannot be considered out of the ordinary for Applicant’s type of employment. The
9 injury did not occur in a public area or in an area shielded from the typical hazards of his
10 occupation. Stepping in a hole created by a ground squirrel, while working at a rural farm
11 cutting weeds, cannot be described as an uncommon, unusual and totally unexpected
12 occurrence.
13

14 Applicant incorrectly asserts that Defendant did not produce evidence that the fall was
15 “slow, gradual, or in any other way ‘not sudden.’” (Petition, p. 5.) First, this incorrectly
16 conflates the “sudden” requirement (as are most specific injuries) with the “extraordinary”
17 requirement. Second, Mr. Mueller testified that while many employees have stepped in holes
18 (which are nearly impossible to avoid), he knew of no other employees who had been injured
19 because of stepping in a hole. (Minutes of Hearing and Summary of Evidence, 5/14/15, p.
20 6:25-27.) That no other employees had been injured in this manner does not make the injury
21 “extraordinary.” (See *Garcia, supra*, 204 Cal.App.4th at p. 774 (“Garcia’s observations
22 during his brief employment at Cole Ranch and his prior unspecified fruit-picking experiences
23 do not establish his injury was caused by an event that was uncommon, unusual and totally
24 unexpected.”); *Aresco, supra*, 79 Cal. Comp. Cases at p. 1192 (writ denied) (Applicant’s
25 injury—not the presence or absence of other similar injuries—is the focus of the inquiry.)

26 Applicant presented no credible evidence that stepping in a hole, given the nature of his
27 employment at this rural farm, was an “uncommon, unusual and totally unexpected
28 occurrence.” Defendant, in contrast, presented credible evidence that holes were common in

1 such a rural farm and that farm employees, as part of their working on the property, often step
2 in these holes.

3 **IV. CONCLUSION**


4
5 The WCJ correctly noted that the nature of Applicant's work as farm laborer cutting
6 weeds on a rural farm, where holes are common, was the compelling inquiry. Defendant
7 presented un rebutted evidence that holes are so common that every employee steps in one
8 eventually. Further, Applicant's job duties required outdoor labor, on the farm property. The
9 WCJ correctly judged the nature of his employment and the nature of the rural farm, and
10 concluded that stepping in the hole was not "extraordinary."

11 Applicant's Petition should be denied.

12 Dated: June 17, 2015

Respectfully submitted,

Bradford & Barthel, LLP

15 By: 
16 MICHAEL P. BURNS
17 Attorneys for Defendants

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
28

VERIFICATION


STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

I have read the foregoing **DEFENDANT CRUM & FORSTER'S 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 17, 2015, at San Jose, California.



MICHAEL P. BURNS
Attorneys for Defendants

1 BRADFORD BARTHEL SAN JOSE
Asheley Alexander
2 EAMS Firm Manager
aalexander@bradfordbarthel.com
3 (559) 442-3602

4
5 **PROOF OF SERVICE**
(C.C.P Section 1013a, 2015.5)

6 STATE OF CALIFORNIA)

7) ss.

8 COUNTY OF SANTA CLARA)

9 **RE: GENARO MIRAMONTES VS. TIMOTHY MUELLER & KATHERINE**
CAMPBELL DBA RIVERDOG FARM
10 **Claim No.: PZC00514557**
Our File No.: 0141.057666

11 I, Marisol Fernandez, am a citizen of the United States and am employed in the county
12 of the aforesaid; I am over the age of 18 years and not a party to the within action; my business
13 address is 2841 Junction Avenue, Suite 114, San Jose, California 95134.

14 On June 17, 2015, I served the within document(s) described as:

15 **DEFENDANT CRUM & FORSTER'S ANSWER TO APPLICANT'S PETITION FOR**
16 **RECONSIDERATION**

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

18
19 (ORIGINAL) Filed Electronically via EAMS.

20 (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope
21 addressed as set forth on the attached mailing list. I placed each such envelope for
22 collection and mailing following ordinary business practices. I am readily familiar
23 with this Firm's practice for collection and processing of correspondence for mailing.
24 Under that practice, the correspondence would be deposited with the United States
Postal Service on that same day, with postage thereon fully prepaid at San Jose,
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.

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

26 Executed on June 17, 2015, at San Jose, California.

27 Marisol Fernandez
(Type or print name)

M. Fernandez
(Signature)

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
28

SERVICE LIST

Crum & Forster
Post Office Box 14217
Orange, California 92863

Law Office of Manuel Reynoso
2690 South White Road, Suite 240
San Jose, California 95148

Genaro Miramontes
305 San Antonio Ct. Apt. 2206
San Jose, CA 95116

Timothy Mueller & Katherine Campbell dba
Riverdog Farm
Post Office Box 42
Guinda, California 95637
Attn: Timothy Mueller /
PERSONAL & CONFIDENTIAL