WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BRADEN NANEZ, *Applicant*

vs.

3 STONEDEGGS, INC.;
TECHNOLOGY INSURANCE COMPANY, Adjusted by AMTRUST NORTH AMERICA, *Defendants*

Adjudication Number: ADJ14015513
Redding District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Opinion and Decision After Reconsideration we issued on February 15, 2023, wherein we rescinded the workers' compensation administration law judge's (WCJ) findings that applicant (1) did not sustain injury arising out of and in the course of employment (AOE/COE); (2) violated company policy when he left the worksite without permission on the date of his injury; and (3) was engaged in a material deviation and complete departure from his employment at the time of injury; substituted findings that (1) the commercial traveler rule applies to applicant's accident; (2) applicant's claim is not barred by the going and coming rule and intoxication; (3) applicant sustained injury AOE/COE in the form of a fracture to the right femur; and (4) the issues of whether applicant sustained injury in the form of a traumatic brain injury and bruised lung are deferred; and returned the matter to the trial level for further proceedings consistent with our decision.

Defendant contends that applicant's petition for reconsideration was untimely, and that the evidence establishes that applicant was engaged in a material deviation from his employment at the time of injury.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report).[1]

[1] As discussed below, we decline to consider the Report.

Applicant filed a request for leave to file a supplemental pleading, which we decline. (Cal. Code Regs.,tit. 8, § 10964.)[2]

We have reviewed the Petition for Reconsideration and the Answer. Based upon our review of the record, and as discussed below and in February 15, 2023 Opinion and Decision After Reconsideration, which we adopt and incorporate herein, we will deny the Petition.

Before we address the merits of the Petition, we acknowledge receipt of the Report. Under WCAB Rule 10962, petitions for reconsideration are referred to the WCJ from whose decision relief is sought so that the WCJ may provide a discussion regarding the support in the record for the decision as well as a recommendation as to what action should be taken. (Cal. Code Regs., tit. 8, § 10962.)

In this case, the decision from which the Petition seeks relief is our February 15, 2022 Opinion and Decision After Reconsideration, and there are no grounds for its referral to the WCJ. It was, therefore, neither necessary nor appropriate for the WCJ to opine on the merits of the Petition.

Accordingly, we decline to consider the Report.

As to the merits of the Petition, we turn first to defendant's contention that applicant's petition for reconsideration was untimely. Specifically, defendant argues that the time limit for filing applicant's petition for reconsideration should have begun to run when applicant received the WCJ's findings and order because applicant's notice thereof may be "imputed" to his attorney. (Petition, p. 5:26.)

However, when a party is represented, service is generally required only upon a party's representative and not upon the party itself, and when the WCJ issues any final order, decision or award on a disputed issue after submission, the WCJ is required to serve all parties of record, including their representatives. (Cal. Code Regs., tit. 8, §§ 10625(a), 10628(a).)

Hence, because we have previously concluded that service of the findings and order on applicant's attorney was defective, and because the WCJ was required to serve the findings and order on all parties of record, we are unpersuaded that notice may be imputed to applicant's attorney.

[2] Because applicant's request seeks leave to file a supplemental pleading in response to the Report, and because we decline to consider the Report, we conclude that the proposed supplemental pleading is unnecessary to our decision herein.

Accordingly, we are unable to discern merit in defendant's contention that applicant's petition was untimely.

We next address defendant's argument that the evidence establishes that applicant was engaged in a distinct departure or deviation from his employment at the time of injury.

First, defendant argues that because it supplied its employees with various items for sustenance, comfort, and safety, it is simply not possible that applicant left the worksite for a leisure time activity which an employer would reasonably expect to be incident to its requirement that an employee work at a distant location.

However, as we previously explained, because applicant's manager, James Todd, surmised that applicant traveled to Yreka to use his cellular telephone, and because the evidence fails to show that applicant was instructed to refrain from using his own car during his off hours or for personal reasons, applicant's conduct was what an employer would reasonably expect to be incidental to its requirement that its employees work at a distant location. (See *IBM Corp. v. Workers' Comp. Appeals Bd. (Korpela)* (1978) 77 Cal.App.3d 279, 283 [43 Cal.Comp.Cases 161]; Opinion and Decision After Reconsideration, February 15, 2023, p. 14.)

Accordingly, we are unable to discern merit to defendant's contention that it was not possible for applicant to travel to Yreka for any purpose other than one constituting a distinct departure or deviation from employment.

Second, defendant argues that because it limited the use of its company vehicles at the worksite and generally expected its employees not to leave the site unless they had to, applicant's act of leaving the site without notifying a superior constituted a distinct departure or deviation from employment.

However, as we previously explained, applicant's accident occurred while he was using his own car during his time off work from a location to which defendant had authorized him to bring the car without placing any limitation on its use. (Opinion and Decision After Reconsideration, February 15, 2023, p. 14.) It follows that applicant's conduct was not a distinct departure or deviation from employment.

Accordingly, we discern no merit in defendant's argument that the commercial traveler rule should not apply because applicant left the worksite without notifying a superior.

Third, defendant argues that because applicant's co-worker, Brandon Duarte, had previously suspected him of smoking marijuana just outside of the worksite, a test of applicant's

blood taken after the accident was positive for THC, and investigating officers found an odor of marijuana and signs of ashes in applicant's car, applicant's drive to Yreka could only have been for the purpose of smoking marijuana—a distinct departure or deviation from employment.

However, as we previously explained, the WCJ found that there was no evidence that applicant was intoxicated at the time of the accident, suggesting that applicant did not ingest marijuana during his off hours on the day of the accident. (*Id*., p. 9.)

Additionally, the record lacks evidence that it was necessary for applicant to drive the seventy-five mile distance to Yreka for such a purpose.

Accordingly, we discern no merit to defendant's contention that applicant drove to Yreka for the purpose of smoking marijuana.

Fourth, citing *Henein v. Workers' Comp. Appeals Bd*. (1985) 50 Cal.Comp.Cases 279, defendant argues that the commercial traveler rule should not apply to applicant's accident because his worksite assignment was to last up to six-months, making the assignment quasi-permanent.

In *Henein*, the court found that a civil engineer injured in Saudi Arabia after his Sunday through Thursday morning workweek had ended was not a commercial traveler on a temporary, out-of-town assignment because he was expected to continue to work in that country "on at least a quasi-permanent basis." (*Henein*, *supra*, at p. 280.)

In this case, applicant's assignment was to provide food service to firefighters and forestry workers for a three- to six- month period, and we discern no basis on this record to deem his assignment quasi-permanent. (Opinion and Decision After Reconsideration, February 15, 2023, p. 9.)

Accordingly, defendant's contention that the commercial traveler rule does not apply because applicant was on a quasi-permanent assignment at the time of injury lacks merit.

Fifth, citing *Hatten v. Wilbur Little Constr. Co*. (1971) 36 Cal.Comp.Cases 3, defendant argues that the commercial traveler rule should not apply because applicant did not travel from his home base to his worksite assignment.

In *Hatten*, the court found that the commercial traveler rule did not apply where the applicant was dispatched from his home to the distant site where he was injured, opining that the commercial traveler rule "assumes travel from a home base, or regular place of employment, to another distant spot where employment activity must be carried on." (*Hatten*, *supra*, at p. 5.)

Here, defendant asked employees, including applicant, who were working at its Brownsville site to volunteer to travel to work at another, more remote worksite and applicant agreed. Hence, because applicant was sent not from his home, but from the Brownsville site, to the more remote worksite, the commercial traveler rule applies. (Opinion and Decision After Reconsideration, February 15, 2023, p. 14.)

Accordingly, we discern no merit to defendant's contention that the commercial traveler rule should not apply because applicant did not travel to his assignment from a home base.

Accordingly, we will deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Opinion and Decision After Reconsideration issued on February 15, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 21, 2023

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

BRADEN NANEZ
LAW OFFICES OF LARRY S. BUCKLEY
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN

SRO/*cs*

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