WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GRANT ELLISON, *Applicant*

vs.

CITY OF SAN BUENAVENTURA;
Permissibly Self-Insured and adjusted by ATHENS ADMINISTATORS, *Defendants*

Adjudication Number: ADJ15229971
Oxnard District Office

OPINION AND 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. For the reasons stated below and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Whether an employee's injury arose out of and in the course of employment is generally a question of fact to be determined in light of the particular circumstances of the case. (*Wright v. Beverly Fabrics* (2002) 95 Cal.App.4th 346 [67 Cal.Comp.Cases 51].)

As the WCJ noted in his report, the parties agree that the employer encouraged but did not require employees to be vaccinated against COVID-19 because applicant's employer was concerned about having enough employees available and wanted to reduce the number of employee absences. The "dual purpose" rule states, "If the employee's activity has a dual purpose, i.e., if he combines personal acts with the business of his employer, and the business is a substantial factor, he is considered in the course of his employment." (*Leonard Van Stelle, Inc. v. Industrial Acc. Com*. (1963) 59 Cal.2d 836, 840 [28 Cal.Comp.Cases 140].) In this case, applicant's employer strongly encouraged vaccination with an aim of reducing absences. Applicant's decision to be vaccinated substantially benefited his employer and was not a purely personal decision.

In addition, applicant's decision to be vaccinated may be analyzed under the personal convenience doctrine. "Acts of 'personal convenience' are within the course of employment if

they are 'reasonably contemplated by the employment.'" (*Price v. Workers' Comp. Appeals Bd*. (*Price*) (1984) 37 Cal.3d 559, 568 [49 Cal.Comp.Cases 773]; *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd. (Makaeff)* (1977) 69 Cal.App.3d 170, 176 [42 Cal.Comp.Cases 297]; *Vogt v. Herron Construction* (2011) 200 Cal.App.4th 643, 132.) "[A]cts necessary to the life, comfort and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment." (*Price, supra,* 37 Cal.3d at 567-68 (citations omitted).) By availing himself of the offered vaccine, applicant's effort to avoid illness that would impair his ability to perform his employment duties is incidental to his employment.

Based on the facts of this case, the WCJ correctly determined that applicant's vaccine injury was work related.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 17, 2023

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

GRANT ELLISON
GORDON, EDELSTEIN, KREPACK, GRANT, FELTON & GOLDSTEIN
EMPLOYER DEFENSE GROUP, LLP

MWH/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Defendant, the CITY OF SAN BUENAVENTURA, by and through their attorneys of record, has filed a timely Petition for Reconsideration challenging the Findings, Award & Order of 11 January 2023. In it, Petitioner argues that the undersigned erred in finding that the injury arose out of employment (AOC.) Specifically, they argue that a worker (in this case a firefighter) who is encouraged by his employer to obtain the COVID – 19 vaccine but who is not required to obtain the vaccine is not liable for any injury caused by side – effects of the vaccine. They also argue that the Ezzy vs WCAB test [(1983) 146 Cal.App 3d 252; 48 CCC 611] is not applicable to these facts. Lastly, they argue that there is no evidence that the Moderna Covid vaccine confers a special benefit to the City of San Buenaventura.

Applicant, GRANT ELLISON, has filed a timely Answer which argues that the case law supports the conclusion that both AOE (Arising out of Employment) and COE (Course of Employment) are established on these facts. He also argues that the Ezzy line of cases are applicable to this case.

It is recommended that reconsideration be denied.

II

FACTS

APPLICANT, GRANT ELLISON aged 44 years at the time of injury while employed as a fire captain at Ventura, California by the City of San Buenaventura (Ventura) sustained injury arising out of and in the course of said employment on 06 February 2021 when he suffered serious side effects as a result of obtaining the Moderna Covid 19 vaccination.

Applicant is a fire captain as well as an Emergency Medical Technician (EMT) captain working for the Fire Department of the City of San Buenaventura. As such, he was a first responder to incidents involving people who were either sick or injured. Often, this involved people with respiratory ailments requiring that applicant work in close proximity with the patients.

When the Covid vaccine became available, the City's Response Manager, Heather Ellis, strongly encouraged all the employees of the City, including all the Firefighters and EMT's to obtain the covid vaccine. Both the applicant and Ms. Ellis testified that the City did not require the shot but strongly encouraged it. They chose not to mandate the shot because they were afraid that making it mandatory would result in loss of personnel. By the same token, they strongly encouraged it so that they would not suffer from too many absences.

The case proceeded to trial and the undersigned found injury AOE/COE and this Petition for Reconsideration followed.

III

DISCUSSION

This is a case involving no factual issues. The testimony of both sides confirms that at no time did the City of San Buenaventura ever mandate that its firefighters or EMT's obtain either of the Covid 19 vaccinations. However, both witnesses also agree that it was strongly encouraged. Both witnesses cited emails that Ms. Ellis sent to the applicant that encouraged city employees to obtain one of the shots.

Also, there is no medical issue that the Moderna shot caused serious side effects to Mr. Ellison. The un-rebutted medical reports of Dr. Fieman credibly establish the causal links.

The crux of the problem at issue in this case is AOE. The employer argues that since the shot was voluntary and not mandated by the City, they should not be held responsible for it. They also argue that the facts linking the benefits of the shot to the City were not established.

The case law for deciding this issue includes three specific cases. As defendant correctly points out, the Ezzy case, supra, is not really on point. Applicant argues that that it applies by analogy but there are cases that are more on point.

In Roberts vs. USO Camp Shows Inc. (1949) 14 CCC 136 the Second District Court of Appeal held that where a musician was required to obtain "various inoculations" and contracted encephalitis as a result, he was barred from pursuing a civil action due to the application of the exclusive remedy doctrine. This case actually has a related holding that the then-new Labor Code § 2802 could not be used to get around the exclusive remedy doctrine.

Similarly, in Maher vs. WCAB (1983) 33 Cal.3d 729; 190 Cal.Rptr 904; 48 CCC 326, the California Supreme Court held that where mandated testing of a hospital worker was found to be positive for tuberculosis and where the worker was required to have treatment for tuberculosis in order to maintain her employment at the hospital, the side-effects of the treatment became compensable. This case is interesting in that it provides a very complete AOE analysis.

More recently, in St. Agnes Medical Center vs. WCAB (Cook) (1998) 63 CCC 220 the WCAB in a panel decision applies the Maher analysis to a case involving the side-effects of a flu shot mandated by the employer.

While the holdings in the first two cases involve mandatory treatment or inoculations, both cases have dicta that support the fact that the treatment or inoculation need not be mandatory to be compensable. In Maher, the Supreme Court uses adds language stating, "the employer clearly benefited from the treatment that Maher underwent since Maher's usefulness to San Celemente General Hospital as a nursing assistant would have been significantly lessened." The treatment was also recommended by her employer and noted at p.333 to be of benefit to the employer.

The case here for AOE is stronger than the Maher case. It is more in line with the Cook case supra, which not only involved an inoculation, but also involved a shot that was optional. The argument that an optional shot does not make it AOE was rejected by the WCAB panel in Cook.

Lastly, defendant also argues that the evidence does not show that making the Moderna vaccine was of benefit to the City. This assertion is contradicted by the defendant's own witness. She testified that she encouraged the firefighters and EMT's to obtain the shot so that she could keep enough employees on duty to provide services. Also, one could imply that the fact that she sent emails and facilitated the provision of the vaccine to her employees shows that she was aware of the benefits of obtaining full compliance.

Thus, the fact that the vaccine was encouraged by the employer and, at least in part, for the benefit of the employer, establishes injury AOE/COE in this case.

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

ROGER A. TOLMAN, JR.
Workers' Compensation Judge