WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANDREW RIVAS, *Applicant*

vs.

MVP PAYROLL FINANCING, LLC; LCF EMPLOYMENT SOLUTIONS, INC.; UNITED WISCONSIN INSURANCE COMPANY, administered by NEXT LEVEL ADMINISTRATORS, *Defendants*

Adjudication Number: ADJ16359966
Pomona 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. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate as quoted below, and for the reasons stated below, we will deny reconsideration.

We adopt and incorporate the following from the WCJ's report:

FACTS

The Applicant, Andrew Rivas, worked for MVP Payroll Financing, LCF Employment Solutions. He was assigned to physically work as a General Laborer at a facility called Home Chef located in San Bernardino. The Applicant worked the night shift.

Home Chef offered the Applicant optional shuttle services, which provided him with free bus transportation from his residence in Victorville to the Home Chef facility in San Bernardino and back. (MOE/SOE Dec 5, 2023, pg. 4, lines 13-15.) The Applicant elected to utilize the transportation provided by Home Chef to commute to and from work. (*Id*., at pg. 4, liens 18-19.)

The Applicant reported to work on December 8, 2021 at or around the start of his shift at 10:00 p.m. *(Id*., at pg. 5 lines, 13-14.) On this day, the Applicant used the employer-provided transportation to get to work. However, he was feeling sick that day, and requested to clock out early. (*Ibid*.) The Applicant clocked out at or around 12:17 a.m. on December 9, 2021, and he physically exited the Home Chef facility.

> (Defendant's Exhibit B; MOH/SOE Dec 5, 2023, pg. 5, lines 16-17.) He commenced waiting in the designated pick-up area outside of the Home Chef facility. (*Id*. at pg. 5, lines 18-19.) He attempted to find a ride or a means to get home, but given the lateness of the hour, he decided to simply wait for the employer-provided transportation to arrive at the scheduled end of his shift. (*Ibid*.)
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> At around 2:00 a.m., the Applicant's co-worker/friend, Gus, emerged from the Home Chef facility for the scheduled lunch break. (*Id*., at pg. 5, lines 22-23; pg. 6, line 15.) The Applicant wanted to purchase snacks since he was going to have to wait for the bus. (*Id*., at pg. 6, lines 15-16.) Gus and the Applicant walked together to a local AM/PM liquor store to purchase snacks. (*Id*., at pg. 6, lines 15-16.) While walking back, Gus and the Applicant encountered another friend, Giovanni, who was sitting down at a public bus stop separate from the seating area in front of the Home Chef facility. (*Id*., at pg. 6, lines 18-20.) Gus and the Applicant joined Giovanni at this public bus stop. (*Ibid*.) This bus stop was located at or around 1281 Tippecanoe Avenue, San Bernardino, California 92408. (Defendant's Exhibit A.)
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> Shortly before the scheduled end of the lunch break at 3:00 a.m., an automobile collided into the bus stop where Gus, Giovanni, and the Applicant were waiting. (MOE/SOE Dec 5, 2023, pg. 6, lines 3; 8-10.) As a result of this incident, the Applicant alleged to have sustained injuries to his legs, head, neck, hips, left hand, left middle finger, left ring finger, right knee, right ankle, left ear, vision, psyche, and in the form of loss of consciousness and depression. (*Id.*, pg. 2, lines 5-9.)

(Report, pp. 2-3.)

On December 5, 2023, trial went forward on issues including injury arising out of and in the course of employment (AOE/COE) and whether applicant's alleged injury was non-compensable under the "going and coming rule." (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 5, 2023, p. 2.)

On January 23, 2024, the WCJ issued the Findings and Order and Opinion on Decision (F&O), finding that applicant's claim was not barred by the going and coming rule, given the application of the "special risk" exception thereto. The WCJ deferred the issue of injury AOE/COE pending further development of the record and ordered the issue off calendar.

In the Report, the WCJ addressed the application of the "special risk" exception to the going and coming rule, in pertinent part, as follows:

> *Going and Coming Rule: Special Risk Exception*
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> Normally, when an injury occurs during the commute to or from work, the going and coming rule will apply to prevent compensation unless the injury can be found to fit within one of the many exceptions to the rule. (*Johnson v. Stratlaw* (1990)

224 Cal. App. 3d 1156, 1161.) One such exception is the special risk exception upon which an employee will be entitled to compensation, if the employment creates a special risk, for injuries sustained within the field of that risk. (*Ibid*.) Such a risk may attend the employee as soon as he enters the employer's premises or the necessary means of access thereto, even when the latter is not under the employer's control or management. (*Ibid*.) And this principle applies when the employee is entering or leaving the employer's premises.

In *General Ins. Co. v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 595, 598, hereinafter *Chairez*, the Court devised a two-prong test to determine the applicability of the special risk exception: (1) but-for the employment the employee would not have been at the location where the injury occurred; and (2) if the risk is distinctive in nature or qualitatively greater than risks common to the public. (*Ibid*.)

The undersigned WCJ found that the going and coming rule did not apply to bar compensation given the application of the special risk exception. Petitioner asserts that the special risk exception does not apply, analogizing these facts to those in *Chairez*.

In *Chairez, supra* 16 Cal.3d 595, the injured worker parked his car in front of his place of employment, got out of the car, and was struck by a passing motorist. The Court in *Chairez* found that the special risk exception did not apply, reasoning that being struck by a passing motorist is a type of risk the public is subjected to daily, and that there was nothing in the facts to indicate that the injured worker was exposed to a greater risk from passing motorists than was anyone else on La Cienega that morning. (*Id*., at pg. 601.) The Court further emphasized that the injured worker in *Chairez* was parked on a public street at the time and in a location where parking is available to the general public.

Petitioner provides a convincing argument by analogizing the facts in the instant case to those in *Chairez*. Like in *Chairez*, the Applicant in the instant case sustained his injuries within the public domain, specifically at a public bus stop that was adjacent to a public street upon which members of the general public had access to. And Petitioner further argues that any member of the general public occupying the public space at that bus stop would have been exposed to the same risk of being struck by a reckless driver, regardless of where any of them worked. Like in *Chairez*, Petitioner argues that being hit by a passing motorist is a type of risk the public is subjected to daily....

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However, the going and coming rule is a "slippery concept" that is riddled with exceptions, all of which are difficult to apply uniformly. (*Santa Rosa Junior College v. Workers' Comp. Appeals Bd. of Cal. & Joanne Smythe*, 50. Cal. Comp. Cases 626, 630.) Neither the rule nor its exceptions are susceptible to "automatic

application," *and each case must be judged on its own unique facts*. (*Emphasis added*.) (*Ibid*.)

And one factor in this case that is distinguishable from *Chairez* is the component involving the employer-provided transportation. Petitioner does not address or reconcile the discernable fact that because the Applicant elected to use the employer-provided transportation to commute from his residence in Victorville to the Home Chef facility in San Bernardino, he had to wait for a few hours for the same to pick him up after having clocked out early due to illness.

The undersigned maintains that by offering the Applicant transportation from his residence in Victorville to the Home Chef facility in San Bernardino and back, the employer ultimately placed the Applicant in a position of risk that members of the general public would not be exposed to. And though being hit by a vehicle while waiting at a public bus stop may be the type of risk the public is subject to daily, the undersigned believes that Applicant's employment subjected him to a risk distinctly or quantitatively greater than that common to the public generally. The longer the Applicant had to spend waiting quantitatively increased the risk of being exposed to the hazards in that setting. Members of the general public are typically not subjected to having to wait hours in the middle of the night in San Bernardino the way the Applicant had to on December 9, 2021. And despite the Applicant having some agency by electing to utilize the employer-provided transportation, Home Chef ultimately created the risks presented by offering the transportation. Home Chef may have mitigated these risks by ensuring prompt return transportation for any employees that clock out early or by requiring such employees to wait within the facility until the transportation arrives.

Field of Risk

As aforementioned, an employee may be entitled to compensation under the special risk exception, if the employment creates a special risk, for injuries sustained within the field of that risk. (*Johnson, supra,* 224 Cal. App. 3d at 1161.)

Petitioner further cautions that allowing the application of the special risk exception in this case would broadly expand the "field of risk" to the point where the Applicant would never be considered "off work" until he has entered his home regardless of what he does or where he goes up until that time. Petitioner raises legitimate concerns as a broadly expanded definition of "field of risk" can potentially expose employers to limitless and unpredictable liability, and the undersigned WCJ agrees that special care should be taken when deciding the boundaries of the "field of risk." But as aforementioned, each case must be judged on its own unique facts. And case law provides some guidance.

The holding in *Parks v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 585 shows that the field of risk can be limited to a specific transitory time and space. The injured schoolteacher in *Parks* sustained injury after being assaulted by youths

shortly after leaving work while temporarily stopped in traffic due to schoolchildren crossing the street; the field of risk was seemingly limited to the short window in time and the specific geographic area where the injured worker would be halted in traffic due to crossing schoolchildren. However, the holding in *Johnson, supra*, 224 Cal. App. 3d at 1159 shows that the field of risk can be more expansive in time and space and less predictable. The employer in *Johnson* had a minor employee work until after 2:00 a.m., causing the minor to become tired and involved in an automobile accident about 13 miles away from his place of employment (2 miles away from his home during his 15-mile commute home.) In *Johnson*, the Court contemplated a more expansive field of risk that extended to at least the 13 miles from the place of employment to where the accident ultimately occurred. In both *Parks* and *Johnson*, the injured workers were in the process of commuting home.

Admittedly, this case is distinguishable from *Parks* and *Johnson* in that the Applicant was not injured during his commute. In fact, his commute back home had not yet started given that he had to wait hours for the bus to arrive. And this invariably raises questions as to whether the limits and bounds of the field of risk should be affected by the type of activities the Applicant engaged in and/or his intent at the time the injury occurred. However, at this juncture, the Court only needs to consider whether the specific actions and events leading up to the Applicant's injury fall within field of risk.

The undersigned WCJ maintains that the field of risk should include the reasonable geographic spaces the Applicant had to traverse in order to find sustenance while waiting hours for the employer-provided transportation to arrive. Having only clocked out about 2-hours into his shift and unable to find a ride home, the Applicant had accepted that he needed to wait several hours for the transportation to arrive in order to get home. When considering the totality of the circumstances, the undersigned WCJ believes that it was reasonable and reasonably foreseeable for the Applicant to want to seek sustenance at local establishments in order to tide himself over while waiting hours for the bus, especially if he was feeling ill.

As such, the undersigned WCJ maintains that the Applicant injury occurred within the field of risk created by the employer when Applicant was made to wait several hours for the employer-provided transportation to arrive.

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the Defendant's Petition for Reconsideration be denied.

(Report, pp. 2-9.)

In the Opinion on Decision, the WCJ further explained that the "field of risk" created by applicant's employment also included the public bus stop that the automobile ultimately collided

into. The WCJ stated that this conclusion must follow, in light of the well-established principle that any reasonable doubt as to the applicability of the going and coming doctrine must be resolved in the employee's favor. (Opinion on Decision, pp. 9-10, citing *Hinojosa v. Workmen's Comp. Appeals Bd.* (*Hinojosa*) (1972) 8 Cal.3d 155, 156 [37 Cal.Comp.Cases 734]; see also Lab. Code, § 3202.)

Upon review, we conclude that there is substantial evidence to support the WCJ's decision to apply the "special risk" exception to the going and coming rule, and we decline to disturb this decision. (*Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (*Garza*) (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637, fn. 19 [35 Cal.Comp.Cases 16]; *Gijon v. Robinson* (October 26, 2018, ADJ7813892) [2018 Cal. Wrk. Comp. P.D. LEXIS 570].)

It is also worth considering whether applicant's claim falls within the "personal convenience" exception to the going and coming rule. "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], citations omitted) and may include obtaining sustenance (*Toohey v. Workmen's Comp. Appeals Bd*. (1973) 32 Cal.App.3d 98, 102 [38 Cal.Comp.Cases 309]). "[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*, at pp. 567-568, citations omitted.) "In view of the policy favoring employee compensation, doubts as to whether an act is reasonably contemplated by the employment are resolved in favor of the employee." (*Id.* at p. 568, citations omitted; see also *Hinojosa, supra,* 8 Cal.3d at p. 156; *Guerra v. Workers' Comp. Appeals Bd.* (*Guerra*) (2016) 246 Cal.App.4th 1301, 1310 [81 Cal.Comp.Cases 324]; *Garza, supra,* 3 Cal.3d at p. 317; Lab. Code, § 3202.)

As stated by the Court of Appeal in *North American Rockwell Corp*. *v. Workmen's Comp. App. Bd*. (*Saksa*) (1970) 9 Cal.App.3d 154 [35 Cal.Comp.Cases 300],

> In drawing the line between those acts which shall be deemed work-related and those considered to be purely personal, it is generally stated as a basic principle that an employee is in the course of his employment when he does those reasonable

> things within the time and space limits of the employment which his contract with his employer expressly or impliedly permits him to do.
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> It has long been recognized that certain acts are, under the common standards of humanity, so normal, acceptable, and reasonably to be expected in the course of employment, that they must be impliedly contemplated as permissible acts under the employment contract….Whether a particular activity be classified by the term's response...[a] personal comfort or convenience...courtesy, or common decency, the point is that the activity was reasonably to be contemplated because of its general nature as a normal human response in a particular situation or in some cases because of its being recognized as an acceptable practice in the particular place by custom. Human services cannot be employed without taking the whole package.

(*Saska, supra,* 9 Cal.App.3d at pp. 158-159, citations omitted.)

There is also an interesting pull quote from the Appeals Board en banc decision of *Fitzgerald v. Hamerslag Equipment* (*Fitzgerald*) (1977) 42 Cal.Comp.Cases 773 that reads:

> The clearest example [of the application of the "personal convenience doctrine"] is the recent case of *Vlahovic Sewing Contractors and Employers Mutual Liability Insurance Company of Wisconsin v. WCAB* (*Cepeda*) (1977) [42 Cal.Comp.Cases 12] (writ denied). In that case, the applicant was struck by an automobile in a public street on her coffee break while buying coffee at a canteen truck near her employer's premises. The applicant was on an uncompensated coffee break. The applicant was found to be acting for the mutual comfort and convenience of herself and her employer and, therefore, was in the course of her employment when injured.

(*Fitzgerald, supra,* 42 Cal.Comp.Cases at p. 776.)

The principles set forth in *Saska* and *Fitzgerald* could be applied to the evidence in this case. During trial, applicant testified that, on the night of the incident, he was made to wait several hours for his sole means of transportation to arrive, which was furnished by his employer. (MOH/SOE, December 5, 2023, pp. 5-6.)[1] It could be reasonably contemplated that applicant

[1] The fact that the employer's bus was "optional" is not significant for the purposes of this discussion. (MOH/SOE, December 5, 2023, p. 4.) For the purposes of discussing the "personal convenience" doctrine, the fact that applicant's employer furnished him with transportation to and from work simply demonstrates an element of awareness that, while waiting for the bus, applicant may have engaged in acts that, if proven to be acts of personal comfort or convenience "reasonably contemplated by the employment," would be considered permissible under the employment contract. (*Saska, supra,* 9 Cal.App.3d at pp. 158-159; *Price, supra,* 37 Cal.3d at p. 568; *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd*. (1977) 69 Cal.App.3d 170, 177 [42 Cal.Comp.Cases 297]; Lab. Code, § 3202.5.) In other words, we are *not* discussing the application of so-called "employer-furnished transportation" exception to the going and coming rule. (*Cal. Cas. Indem. Exch. v. Ind. Acc. Com*. (1942) 21 Cal.2d 461, 463 [7 Cal.Comp.Cases 305]

would seek sustenance from a local establishment to tide himself over while waiting *hours* for his employer-provided transportation, especially where he was feeling ill, and thus, the course of employment would not be broken. (*Saska, supra,* 9 Cal.App.3d at pp. 158-159; *Fitzgerald*, *supra*, 42 Cal.Comp.Cases at p. 776; see MOH/SOE, December 5, 2023, pp. 5-6; Exhs. B, C.)

While it is a closer call as to whether applicant's decision to join his friend, Giovanni, at the public bus stop near his employer's premises also falls within the personal convenience doctrine, it would not be unreasonable to conclude as much in this case. The evidence shows that, after purchasing snacks at the store, applicant and his coworker/friend, Gus, noticed their other friend, Giovanni, waiting at a nearby public bus stop. Shortly after applicant and Gus joined Giovanni at the bus stop, it was hit by a passing automobile. Thus, the issue is whether, in passing at least part of his hours-long wait with his friend at said bus stop,[2] applicant was engaged in an act of personal comfort "reasonably contemplated by his employment." (*Price, supra,* 37 Cal.3d at p. 568.)

The California Supreme Court has previously provided us with a very general idea of how people may reasonably be expected to act while biding their time under the personal convenience doctrine. Specifically, in *Price,* the Court explained: "[when] people are waiting for something to happen, they rarely stand in one spot; they occupy." (*Price, supra,* 37 Cal.3d at p. 568, citation omitted.) Here, instead of idly waiting at the Home Chef pick-up spot for his bus, applicant made use of his time by visiting with a friend at a nearby bus stop within the field of risk created by his employment. Applicant's decision to bide at least some of his time with a companion in the middle of the night while waiting hours for his own bus appears to be a "normal human response" to the situation. (*Saska, supra,* 9 Cal.App.3d at pp. 158-159.) As the court in *Saska* pointed out, "[h]uman services cannot be employed without taking the whole package." (*Ibid*.) Therefore, applicant's decision to visit his friend at the public bus stop may fall under the "personal convenience" doctrine, particularly in light of the rule that any reasonable doubt as to whether the act of the employee is contemplated by the employment should be resolved in favor of the

["if an employer, as an incident of the employment, furnishes his employee with transportation to and from the place of employment and the means of transportation are under the control of the employer, an injury sustained by the employee during such transportation arises out of and is in the course of the employment and is compensable."].)

[2] We remind the parties that the WCJ has already determined that, based upon the evidence, the public bus stop where the incident occurred was located within the "field of risk" created by the employment, and we decline to disturb the WCJ's finding.

employee. (*Price*, *supra*, 37 Cal.3d at pp. 567-568; see also *Hinojosa, supra,* 8 Cal.3d at p. 156; *Guerra, supra,* 246 Cal.App.4th at p. 1310; *Garza, supra,* 3 Cal.3d at p. 317; Lab. Code, § 3202.)

In conclusion, we uphold the WCJ's January 23, 2024 decision that applicant's claim is not barred by the going and coming rule, given the application of the special risk exception. We render no opinion on the issue of injury AOE/COE. This issue was deferred by the WCJ and ordered off calendar pending further development of the record. (F&O, p. 2.) The issue of injury AOE/COE remains at the trial level so that the WCJ may address the issue in the first instance. (See Lab. Code, §§ 5309, 5952(d); *Garza, supra,* 3 Cal.3d at p. 317.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 23, 2024

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

ANDREW RIVAS
THE DOMINGUEZ FIRM
EMPLOYER DEFENSE GROUP

AH/*cs*

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