WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DAVID GARCIA MIRANDA (Deceased);
MAGDALENA PEREZ LOPEZ, Guardian Ad Litem for
MIRANDA GARCIA PEREZ (Minor); ALONDRA GARCIA MIRANDA,
Applicants

vs.

HELMSMAN FIELD LOGISTICS; ZENITH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11726217
Riverside District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact (Findings) issued by a workers' compensation administration law judge (WCJ) on April 6, 2021. The WCJ found that David Garcia Miranda (decedent) did not sustain injury arising out of and in the course of his employment resulting in death on June 29, 2018, because the decedent's injury is barred by the going and coming rule.

Applicant contends that this case falls within the "required vehicle" exception to the going and coming rule pursuant to *Hinojosa v. Workers' Comp. Appeals Bd*. (1972) 8 Cal.3d. 150 [37 Cal.Comp.Cases 734] (*Hinojosa*). Specifically, applicant contends that the testimony of Steven Elmore, owner of defendant Helmsman Field Logistics, establishes that there was an implicit requirement that applicant furnish his own means of transportation in order to perform his job.

Defendant filed an Answer to the Petition for Reconsideration (Answer). The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), wherein the WCJ recommends that the Petition for Reconsideration be denied.

We have reviewed the record in this matter and considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the Report. Based on our review of the record,

and for the reasons set forth in the Report, which we adopt and incorporate herein, and for the reasons set forth below, we deny the Petition for Reconsideration.

Liability for workers' compensation accrues for an injury "arising out of and in the course of the employment." (Lab. Code, § 3600, subd. (a).) "Under the well established going and coming rule, an employee does not pursue the course of his employment when he is on his way to or from work." (*Smith v. Workmen's Comp.App.Bd.* (1968) 69 Cal.2d 814, 815-816 [33 Cal.Comp.Cases 771] (*Smith*) *citing Zenith Nat. Ins. Co. v. Workmen's Comp. App. Bd.* (1967) 66 Cal.2d 944, 946.) Thus, injuries sustained while an employee is "going and coming" to and from the place of employment do not normally arise out of and in the course of employment because the employee is neither providing benefit to the employer nor under the control of the employer during that commute. (*Santa Rosa Junior College v. Workers' Comp. Appeals Bd*. (1985) 40 Cal.3d 345, 351–352 [1985 Cal. LEXIS 410]; *Hinojosa v. Workers' Comp. Appeals Bd*. (1972) 8 Cal.3d 150, 157 [37 Cal.Comp.Cases 734] (*Hinojosa*).) It applies to a 'local commute enroute to a fixed place of business at fixed hours.' (*Hinojosa, supra*, 8 Cal.3d at p. 157.)" (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038 [82 Cal.Comp.Cases 692].)

Applicant contends that this case falls within the "required vehicle" exception to the going and coming rule, which applies when an employer either expressly or impliedly requires or expects an employee to furnish transportation to perform the job. (*Hinojosa, supra,* 8 Cal.3d. at p. 160 citing *Smith, supra.)* "The exception 'arises from the principle that an employee "is performing service growing out of and incidental to his employment" (Lab. Code, § 3600) when he engages in conduct reasonably directed toward the fulfillment of his employer's requirements, performed for the benefit and advantage of the employer.' (*Smith, supra*, at pp. 819–820.)" (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1039 [82 Cal.Comp.Cases 692].)

In *Smith,* "the employer 'instructed Smith to have his car available on the job every morning' (p. 821) so that 'he could visit his clients on field days . . . and . . . would be available to see clients in cases of emergency on regular office days." (P. 816.) We held that the requirement that the employee furnish his means of transportation effected a resumption of the employment relationship." (*Ibid.*) In *Hinojosa,* the Court found that the employer's required use of a vehicle can be implicit or explicit:

> Although in the instant case the requirement for the car was implicit rather than express, the use of a vehicle can be "an implied or express condition of . . .

> employment." (*Huntsinger v. Glass Container Corp*. (1972) 22 Cal. App. 3d 803, 809 [99 Cal. Rptr. 666].) The condition implicit in the employment itself dictated the use of car transport; no words of the employer were necessary; the situation, like res ipsa loquitur, spoke for itself. **To get from one noncontiguous field to another within the work day *required* the use of automobile transport. Since the employer furnished no such private transport the employer in effect imposed the requirement that the employees themselves procure such transport in the form of cars driven to and from work each day to one of the seven or eight fields designated by the foreman.** The implied requirement here became as concrete a part of the contract of employment as the express requirement in *Smith*. (*Hinojosa, supra,* 8 Cal.3d at pp. 161-162, bold added.)

In this case, applicants failed to produce *any* evidence, and thus, no substantial evidence that this case falls within the "required vehicle exception" to the going and coming rule. There is no evidence that it was an implicit or explicit requirement of decedent's employment to furnish his own transportation, i.e. to move from site to site. Although applicant relies on the testimony of Steven Elmore, Mr. Elmore actually testified that applicant worked at a fixed location on June 29, 2018; and, moreover, that there would never be a time when one of his workers would have had to travel from one location to another location within the same day. (Joint Exh. 1, Deposition of Steven Elmore, July 17, 2020, pp. 13-14, 16, 22-24.)

> Q On the day of the accident that we're talking about, again, that is on June 29, 2018, do you know where that particular crew was scheduled to work?
>
> A Of course. It was Mammoth Ranch, and it was Block 9. It was off-season [l]emons.
> ...
>
> Q Okay. So, for that -- for that request to do the work, was Block 9 the only block that they were working on?
>
> A Yes.
> ...
>
> Q Okay. And where was the -- where was that accident at in relation to the Block 9 that they were going to?
>
> A It was -- they were coming from Block 9, and it was -- I want to say it was 30 miles. But that's a complete guess, off the top of my head, estimated miles away from where they were coming from; 25 to 30 miles.
> ...

Q ... But the crews don't -- people don't ever come to my office.
Q Okay. So where -- how are the crews, I guess, how did the crews get to the worksite?

A Work starts for a crew at the location that they're starting work at. So they're responsible to get there.
...

I have zero to do with how they get to the jobsite. ... And the vehicle that was being driven by Mr. Esparza was not a company vehicle?

A That's correct.
...

Q Is there ever a time whenever the workers on a particular crew, would have to go from one location to another within the same day?

A No. (*Ibid.*)

The facts of this case are therefore distinguishable from those that established an exception to the going and coming rule in *Hinojosa*. As stated by the WCJ: "A key determining point was in fact that the employees were not traveling between work sites at the time of the subject motor vehicle accident, but rather coming from the single assigned work site Mammoth Ranch, Block 9. A distinction would have been had the subject accident occurred between work sites (identified for this discussion as "blocks") where the result would have been different." (Report, p. 8.) Thus, defendant met its burden of proof to establish that the going and coming rule bars applicants' claim. Unfortunately, applicant then failed to meet their burden of proof to establish an exception to that rule.

Finally, we also note that the going and coming rule *is* applied to employees who make their own carpooling or ridesharing arrangements, and defendant would therefore not be liable under the doctrine of respondeat superior. (*Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal.App.5th 608, 612 [81 Cal.Comp.Cases 993]; see *Anderson v. Pacific Gas & Electric Co. (Anderson*) (1993) 14 Cal.App.4th 254 [employee-driver was not engaged in a special errand for employer merely because he was carpooling with another employee]; *Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028 [no employer liability where carpooling was organized informally by individual workers].)

Accordingly, we concur with the WCJ that decedent did not sustain an injury arising out of and in the course of his employment resulting in death on June 29, 2018 based on the going and coming rule, and that applicants failed to meet their burden of proof to establish that any exception to the going and coming rule applies in this case.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the April 6, 2021 Findings of Fact is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

I DISSENT. (See Separate Dissenting Opinion)

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER'

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 18, 2021

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

MAGDALENA PEREZ LOPEZ, GAL FOR MIRANDA GARCIA PEREZ
ALONDRA GARCIA MIRANDA
LAW OFFICES OF PAYMAN & RAHNAMA
CHERNOW & LIEB

AJF/abs

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

DISSENTING OPINION OF DEPUTY COMMISSIONER SCHMITZ

I respectfully dissent from the majority opinion that applicant's Petition for Reconsideration be denied. I would grant reconsideration pursuant to *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473 (Appeals Bd. en banc), rescind the Findings of Fact issued on April 6, 2021 by a workers' compensation administrative law judge (WCJ), and return this matter to the trial level for development of the record. I concur with the legal authority cited in the majority opinion (see Opinion and Order Denying Petition for Reconsideration, *supra,* pp. 2-3). However, I cannot concur that the record contains substantial evidence to support a finding that liability for decedent's injury is barred by the going and coming rule.

Applicants contend that on June 29, 2018, decedent sustained injury arising out of and in the course of his employment resulting in death, resulting from a motor vehicle accident while he was a passenger in a vehicle driven by a co-worker on their way back from a jobsite. This case went to trial on January 4, 2021 and March 29, 2021 on the issue of "Injury arising out of and in the course of employment, including the affirmative defense of the Going and Coming Rule." (Minutes of Hearing and Summary of Evidence, January 4, 2021 (January MOH), p. 2, errors in the original; Minutes of Hearing and Summary of Evidence, March 29, 2021 (March MOH).) Neither party produced witnesses for trial. (*Ibid.*) The only evidence produced for trial is the July 17, 2020 Deposition of Steven Elmore, who appeared as the person most knowledgeable for defendant Helmsman Field Logistics (Helmsman). (Joint Exh. 1.)

Mr. Elmore is the owner of defendant Helmsman, and testified that there were no records establishing that decedent was employed by defendant on June 29, 2018, and that decedent's name did not appear on any timesheets for that day or the previous date. (Joint Exh. 1, p. 16.)[1] He did not know decedent, nor the other Helmsman employees in the car with decedent at the time of the injury. (*Id.*, p. 20.) The passengers and driver of the vehicle were field laborers picking out of season lemons at Mammoth Ranch, Block 9. (*Id.*, pp. 13-14, 24.) Mr. Elmore did not choose the lemon-picking crew; crew leader Augustine Hernandez was responsible to choose the crew and supervise their work at the jobsite. (*Id.*, pp. 17-18.) Mr. Elmore believed the injury accident occurred as the crew were leaving for the day, about 25 to 30 miles from Block 9. (*Id.*, p. 22.)

[1] Even so, the parties stipulated that decedent was an employee on the date of injury.

Helmsman did not pay the driver of the vehicle to transport the crew to the lemon-picking job, and stated he had "zero to do" with how the crew were transported to the jobsite. (*Id.*, p. 23.) Mr. Elmore referred the attorneys during deposition to Mr. Hernandez and/or the other crew members in the vehicle for verification that decedent worked the lemon-picking job, and for details of the injury accident. (*Id.*, p. 20.)

Mr. Elmore's only knowledge of the injury and the persons involved came from an accident report and the police report. (Joint Exh. 1, pp. 21-22.) However, no accident report or police report were attached to the deposition *or* introduced at trial. (*Id.*; see January MOH and March MOH.) Although the WCJ ordered Mr. Elmore to appear to testify at trial (January MOH, p. 2), he failed to appear (March MOH). There is no explanation in the record explaining his violation of the WCJ's order to appear.

Based on this insufficient and incompetent evidence, the WCJ found that the going and coming rule barred applicants' claim, and that no exception applied. However, a WCJ's decision must be based on admitted evidence (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc)), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952 (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd. (Garza)* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) There is no admitted, substantial evidence that the going and coming rule applies in this case, nor to establish the existence of any of the myriad exceptions to the going and coming rule.

As stated in the majority opinion, the going and coming rule bars claims for injuries sustained during a 'local commute enroute to a fixed place of business at fixed hours.' (*Hinojosa, supra*, 8 Cal.3d at p. 157.)" (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038 [82 Cal.Comp.Cases 692].)[2] The record here shows that defendant's field workers did not commute to a fixed place of business, but rather, as Mr. Elmore confirmed, "[t]he locations and the people that are needed at each site change[d] on a regular basis..." (Joint Exh. 1, p. 23.) In

[2] It is also noted that the going and coming rule "has had a 'tortuous history.'" (*Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 565 [49 Cal.Comp.Cases 772] (*Price*).) The rule, which has often been criticized and is "subject to numerous exceptions," is "difficult to apply uniformly..." and not "susceptible to 'automatic application.'" (*Ibid.* citing *Parks v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 585, 589, fn. 4 [48 Cal.Comp.Cases 208] (*Parks*).) Each case must be "judged on its own 'unique facts.'" (*Ibid*.)

addition, Mr. Elmore testified that Mr. Hernandez, the crew leader, identified and hired the crew for the lemon-picking job. However, there is *no evidence* in the record as to how the crew were chosen, whether they knew each other, how the transportation to the jobsite was arranged, who arranged for the crew to travel together in one vehicle to and from the jobsite. This type of evidence is necessary to a determination of whether the going and coming rule even applies in this case.

For example, Mr. Hernandez was given express authority by defendant to choose the crew, manage the jobsite, and supervise the crew. Thus, if Mr. Hernandez arranged transportation to the jobsite for decedent, he would have been acting on behalf of defendant and the going and coming rule may not bar applicants' claim. (*Lane v. Industrial Acci. Com.* (1958) 164 Cal.App.2d 523, 528 [1958 Cal.App. LEXIS 1639].)

> "...the employer may agree, either expressly or impliedly, that the relationship shall continue during the period of 'going and coming,' in which case the employee is entitled to the protection of the act during that period. Such an agreement may be inferred from the fact that the employer furnishes transportation to and from work as an incident of the employment. (*California C. Indem. Exch. v. Industrial Acc. Com.*, 21 Cal.2d 461 [132 P.2d 815]; *Trussless Roof Co. v. Industrial Acc. Com.,* 119 Cal.App. 91 [6 P.2d 254]; cf. *Breland v. Traylor Eng. etc. Co.*, 52 Cal.App.2d 415 [126 P.2d 455].) (*Ibid.*)

"[I]n order to ensure reliance on substantial evidence, and a complete adjudication of the issues consistent with due process," the WCJ and the Appeals Board both have a duty to further develop the record where there is an absence of, or insufficient evidence to determine the issues raised for trial. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].)[3] Indeed, the Appeals Board has a constitutional mandate to "ensure substantial justice in all cases," and is therefore "clearly permitted" to admit evidence even after the discovery cut-off under Labor Code section 5502, subdivision (d)(3). (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403-405 [65 Cal.Comp.Cases 264]; (Cal. Const., art. XIV, § 4 ["The system of workers' compensation "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State..."]

[3] See Labor Code sections 5701 and 5906; and, *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).)

> **Based on sections 5701 and 5906, it is well established that the WCJ or the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence**. (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal. 3d 312, 318 [90 Cal. Rptr. 355, 475 P.2d 451] [Board should have obtained medical evidence of causation]; *Lundberg v. Workmen's Comp. App. Bd.* (1968) 69 Cal. 2d 436, 440 [71 Cal. Rptr. 684, 445 P.2d 300] [Board should have obtained medical evidence of causation]; *W. M. Lyles Co. v. Workmen's Comp. App. Bd.* (1969) 3 Cal. App. 3d 132, 138 [82 Cal. Rptr. 891] [Board should have explored employee's willingness to work, opportunities for employment and skill level to determine earnings].) (*Ibid.*, emphasis added.)

Here, the issues raised for trial were injury arising out of and in the course of employment, "including the affirmative defense of the Going and Coming Rule." (January MOH, p. 2, errors in the original.) Defendant had the burden of proof to establish that the going and coming rule applies to bar applicants' claim in this case. (Lab. Code, § 5705.) The testimony of Mr. Elmore does not constitute substantial evidence that applicants' claim is barred by the going and coming rule. As the majority points out, there is also an absence of evidence in the record to address whether any of the myriad exceptions to the going and coming rule applies in this case. Instead of complying with the duty to order further development of the record under the circumstances in this case, the WCJ improperly summarily adjudicated the issue of compensability in this case. (Cal. Code Regs., tit. 8, § 10515 ["Demurrers, petitions for judgment on the pleadings and petitions for summary judgment are not permitted."].)

Accordingly, in order to comply with the dictates of due process and the constitutional mandate of substantial justice, I would grant applicants' Petition for Reconsideration, rescind the Findings of Fact, and return this matter to the trial level for further development of the record. Thus, I respectfully dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 18, 2021

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

MAGDALENA PEREZ LOPEZ, GAL FOR MIRANDA GARCIA PEREZ
ALONDRA GARCIA MIRANDA
LAW OFFICES OF PAYMAN & RAHNAMA
CHERNOW & LIEB

AJF/abs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Applicant, by and through his attorney of record, has filed a timely and verified Petition for Reconsideration challenging the Findings and Order dated 4/6/2021 issued by the undersigned judge.

Petitioner seeks reconsideration on the following grounds:

1. The evidence does not justify the findings of fact
2. The findings of fact do not support the Order, Decision, or Award, and;
3. By such Order, Decision or Award, the Workers' Compensation Administrative Law
4. Judge acted without or in excess of his powers.

II

CONTENTIONS

Applicant contends in his Petition:

1. The undersigned judge's interpretation of Labor Code Section 3600 (a)(2) is not correct.
2. The undersigned judge did not consider that applicant was required to transport himself to the place of employment at a designated location and that was incidental to performing the service of the employer pursuant to Labor Code Section 3600 (a)(2).
3. The applicant was within the scope of employment at the time of the auto accident when he clearly required transportation to travel to and from that day's locations, and thus the "going and coming rule" would not be a bar to his fatal motor vehicle accident.

The defendant's Answer was filed 5/12/2021 (EAMS Doc ID36666039) and contends the following:

1. The motor vehicle accident in question occurred during the normal local commute to a fix place of business and at a fixed time, subjecting it to the going and coming rule.

2. The applicant has failed to present any evidence to support an exception to the going and coming rule.
3. The Findings and Order dated 4/6/2021 is justified and supported by the evidence.

III

FACTS

David Garcia Miranda (deceased), age 37 at the time of alleged injury on 6/29/2018, as a farm laborer, at Brawley, California, by Helmsman Field Logistics, claimed to have sustained injury arising out of and in the course of his employment resulting in death.

The employer furnished no medical treatment.

No attorney fees were paid and no attorney fee arrangements were made.

The parties appeared for Trial on 1/4/2021, at which time the applicant's hearing representative confirmed the filing of his authorization to appear and represent the Guardian ad Litem (GAL) for the minor Miranda Garcia Perez, as well as the adult child Alondra Garcia Miranda (EAMS Doc. ID 3503376, 35053377, and 35053378). The stipulations and issues were framed. The deposition of the witness Stephen Elmore of 7/17/2020 was taken into evidence as the only exhibit (Joint Exhibit "1").

The applicant's attorney was given until 1/18/2021 for purposes of submitting a post-Trial Brief and Points and Authorities, and the defendant until 2/1/2021 for purposes of a response. The matter was otherwise continued to 3/29/2021 so as to allow the court's review of the submitted exhibit and the parties Trial Briefs.

Subsequently each party submitted a very well-thought and reasoned Trial Brief.

The applicant's Trial Brief was received on 1/15/2021 (EAM Doc ID 35210532), and contends the following:

1. The fact that the applicant was "going and coming" for an employer with no fixed place of business and the work location would vary on an as-needed basis and thus creating an exception to the going and coming rule.
2. The above exception would be consistent with case law, to include Schreifer v. IAC (1964) 61 Cal 2nd 289, Smith v. WCAB (1968) 69 Cal 2nd 814, and Hinojosa v. WCAB (1972) 8 Cal 3d 150.

Defendant's Trial Brief was received on 1/27/2021 (EAMS Doc ID 3536859), with amendment filed 2/2/2021 (EAMS Doc ID 35399113), contending the following:

1. The motor vehicle accident in question occurred during the normal local commute to a fixed place of business and at a fixed time subjecting it to the going and coming rule.
2. Applicant has presented no evidence to support an exception to the going and coming rule.

Subsequently the parties appeared for Trial, and the matter submitted for decision on the existing record. (An earlier error appearing in EAMS that the case had been submitted for decision was corrected, and a separate Order Vacating Submission and Order Re-Submitting for Decision [as of 3/29/2021] issued.)

IV

DISCUSSION

The only evidence presented was the deposition of Stephen (John) Elmore taken 7/17/2020 (Joint Exhibit "1"). The key portions of his testimony were as follows:

1. It was confirmed that he was the person most knowledgeable (PMK) to address questions as posed by the applicant's attorney (6:8-11), and further that he was the President of the company (7:11-12) defendant Helmsman Field Logistics, Incorporated (7:25-8:1) as well as owner of said company since January 2015 (8:15-16).
2. He generally described the business as a "temp agency" for field workers (8:20-21).
3. All individuals referred out is considered an employee of Helmsman Field Logistics (9:12-16).
4. He would estimate that in any given June (note this month corresponds with the claimed date of injury and death) there would be two to three farm clients (10:15), and that all are located in El Centro, Brawley, and Calexico (10:18).
5. Typically crew leaders "would put the word out" that employees were needed for a specific type of job (11:7-12).
6. Augustine Hernandez was the only crew leader that the deceased employee David Garcia Miranda ever worked under (12:4-7), and would be considered a "frontline supervisor (12:20-22).
7. On the day of the injury/death in question (6/29/2018), this particular crew was scheduled to work at Mammoth Ranch, Block 9 (13:20-24) harvesting off-season lemons (13:23-24).
8. Mammoth Ranch was considered the property (14:12), with "Block 9" referencing a specific field for the owner (14:2-4).
9. As to the duration of the assignment, it is based on how long it takes to get the job done (15:18-19).
10. He was not able to confirm whether the applicant himself was on the assigned crew at the time (17:3-10).
11. As to the number of employees assigned to a job site, this would be up to the client (17:25-18:1-4).
12. He was able to confirm other individuals as employee, these being Jose Pedro Armenta, Alberto Villegas, Angelo Perez, Omar Garcia, Ramiro Bravo, and Cleufas Abundis Esparanza (18:16-19:16), although uncertain as to another individual known only as "Guadalupe" (18:24-19:5).

13. The scene of the subject motor vehicle accident was about 25-30 miles as they (the employees) were coming from Block 9 (22:10-13).
14. While the distance between his office and the work site Block 9 would be approximately 35 miles, the crews do not come to his office (22:21-22).
15. The crew members report directly to the work site and they are responsible for getting there (22:25-23:2), with the locations and the people at are needed at each site changing on a regular basis (23:3-6).
16. The driver of the subject vehicle "Esparza" was not paid anything to transport the workers (23:8-11), and he did not know if he was reimbursed gas money by the other passengers (23:12-14).
17. Each of the passengers in the car had a job title with the company like "field laborer, lemon picker" (23:24-25:3).
18. His recollection is that at this time there were two other clients being Foster Feed Lot and Troy Hutchinson Farms (irrigator) (25:13-15), with the deceased applicant working only as part of the off-season lemon harvest (26:2-3).
19. In the lemon harvest, the employees are paid a piece rate by the bin (26:19-20), and they are not paid for the commute to and from the field (27:1-3).
20. While he was not able to confirm the deceased applicant was actually on the payroll, there could be a number of reasons for this (27:9-28:5).
21. It would be up to the crew leader to keep track of the number of bins for purposes of compensating the employees, but in this instance the assigned crew leader Agustine Hernandez is no longer in this company's employ (29:11-30:4).

In considering this witness' testimony, employment at the time of injury death was a stipulation by the parties (see Minutes of Hearing dated 1/4/2021), and thus this portion of the testimony will not be further considered. As to the issue of whether the subject injury and death were barred by the going and coming rule, key portions of witness Elmore's testimony:

1. There is no established work site, as this would vary and determine the need for employees on any particular day.
2. At the time of the subject motor vehicle accident, the employees (including this deceased employee) were in a private vehicle not owned or operated by the employer.
3. The employees were responsible to getting to and from their assigned work site.
4. At the time of this accident, the employees were in a private vehicle leaving the assigned work site.

Injuries incurred while traveling to or from a work site are ordinarily not compensable when the employer does not provide the transportation, is not paying for the employee's services, and obtains no benefit from the employee's travel. While not set forth in statute, the "going and coming" rule is one that has been defined by case law. Mission Ins. Co. v. WCAB (Fitzgerald) (1978) 34 Cal App. 3d 50; 43 CCC 889); City of San Diego v. WCAB (Molnar) (2001) 890 Cal

App. 4th 1385; 66 CCC 692). However, this "going and coming rule is subject to several exceptions.

One such exception was laid out in Hinojosa v. WCAB (1972) 8 Cal. 3d 150, 501 P.2d 1176, 104 Cal. Rptr. 456, 37 CCC 734. is perhaps the most famous case in this long line of exceptions to the "going and coming" rule. In Hinojosa, the California Supreme Court carved out the "required vehicle exception" or simply if the employer requires a worker to provide their own transportation as a condition of employment, then any injuries that occur during the commute to or from work are compensable to include those occurring between job sites.

Generally, the exceptions to the general rule include:

1. The employee has no fixed place of employment and travels to multiple job sites.
2. The employee injures himself while traveling to a location away from his normal job site.
3. The employee is on a special assignment for the employer;
4. Travel is a significant part of the employee's job duties.

The court carefully considered the arguments as propounded by both sides, to include the case citations as provided by each. A key determining point was in fact that the employees were not traveling between work sites at the time of the subject motor vehicle accident, but rather coming from the single assigned work site Mammoth Ranch, Block 9. A distinction would have been had the subject accident occurred between work sites (identified for this discussion as "blocks") where the result would have been different. While witness Elmore acknowledged that at any given time there may have been multiple farm clients, at the time of this injury there was a single work site to which these employees commuted. In this instance, based on the only testimony of witness Elmore, the employees were returning from this singular work site and were engaged in their normal commute home.

In this case, the court concluded that the deceased employee did not sustain injury and death arising out of and in the course of employment, and that said injury and death were barred by the "going and coming rule."

V

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

DATE: May 13, 2021

Robert Hill
Workers' Compensation
Administrative Law Judge