WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GUSTAVO RITTERSTEIN, *Applicant*

vs.

BERGITTA GROTH, an individual, DBA FAIRY FOREST FARM; UNINSURED EMPLOYERS BENEFITS TRUST FUND, *Defendants*

Adjudication Number: ADJ9532885
Santa Barbara Satellite Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Defendants Bergitta Groth, dba Fairy Forest Farm (Groth), and Uninsured Employers Benefits Trust Fund (UEBTF) seek reconsideration of the Findings of Fact and Award (F&A) issued on February 22, 2019, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that (1) applicant was an employee of Groth; (2) applicant sustained injury arising out of and occurring within the scope of employment (AOE/COE); (3) applicant's average weekly earnings (AWE) is $1,933.88; (4) applicant has need of further medical treatment; (5) applicant is entitled to reimbursement for out-of-pocket medical expenses; and (6) applicant's attorney is entitled to Labor Code section 5710[1] fees in the amount of $2,625.00. The WCJ awarded applicant further medical care, reimbursement for self-procured medical treatment, and attorney's fees consistent with these findings.

Groth contends that the WCJ (1) erroneously found applicant sustained injury AOE/COE on the grounds that applicant's injury occurred while he was riding an all-terrain vehicle (ATV), an activity not related to his employment; and (2) violated her right of due process by effectively serving as advocate on behalf of applicant.

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

UEBTF contends that the WCJ erroneously found injury AOE/COE because applicant's injury occurred under circumstances beyond the scope of the personal comfort and bunkhouse rules and while he was joyriding. UEBTF further contends that the WCJ erred by calculating the AWE without accounting for earnings applicant may have received prior to his employment by Groth.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petitions, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will affirm the F&A, except that we will amend to defer the issue of the amount of applicant's AWE and return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

While allegedly employed by Groth on November 13, 2013, applicant claims to have sustained injury to his spine, nervous system, multiple body systems, and quadriplegia. (Minutes of Hearing and Summary of Evidence, August 15, 2018, p. 2:8-11.)

On August 15, 2018, the matter proceeded to trial of the issues of employment, injury AOE/COE, applicant's earnings claim of $1,933.88 per week based upon applicant's testimony, timesheet, and County rental data; need for further medical treatment, liability for self-procured medical treatment, and attorney's fees. (*Id*., pp. 2:19-3:5.)

The WCJ admitted exhibits entitled Undated Timesheets of Gustavo Ritterstein dated October 1, 2013; U.S. General Services Administration Per Diem Rental Rates for 2014 dated May 21, 2014; and Median Apartment Rental Analysis dated December 31, 2009 and December 31, 2016. (*Id*., pp. 4:17-5:5.)

At trial, applicant testified that he worked for Groth from September 2013 until November 13, 2013, the date of the accident. (Transcript of Proceedings, August 15, 2018, p. 21:3-19.) He worked on Groth's forty-five acre property in Humboldt County, where the terrain is mountainous and there is no asphalt or pavement. (*Id*., pp. 21:18-22:14.) On Groth's property were a house, garage, two cabins, a tool shed, a kitchen area, and the surrounding vegetation consisted mostly of marijuana plants. (*Id*., pp. 22:21-23:19.) He identified other persons working for Groth as Ivan Nadler, Gustav Helbig, Terra Katz, Jason Lynch, and Geraldine Martin. (*Id*., pp. 23:22-24:15.)

Mr. Nadler was responsible for maintenance and construction. Mr. Helbig did many things, "basically trimming like the rest of the employees," and was responsible for the ATV after Mr. Lynch was fired. (*Id*., pp. 24:6-25:11, 60:14-61:11.) Ms. Katz was the manager and cook for all the workers. (*Id*.) Mr. Lynch was in charge of growing and harvesting the marijuana plants. Ms. Martin trimmed the plants. (*Id*.)

When he met with Groth, she hired him to perform maintenance work on her property for "thirty-five dollars an hour and a place to sleep and food." (*Id.*, pp. 28:19-29:15.) The work was to be performed full time, from Monday through Friday, but he could work weekends if he wanted. (*Id*., pp. 29:24-30:5.) Groth's business was growing and selling marijuana, and her children, Ted, aged nine, and Gabrielle, aged eleven, resided on the property. (*Id*., pp. 30:20-24, 37:22-38:4.)

Prior to the accident, he drove the ATV once for personal use; and, after being told not to use it for a non-business purpose, drove it two or three times to deliver harvested plants to the garage where they were received by Ms. Groth and Ms. Katz; once to get it out of a ditch after Mr. Helbig was unable to do so, and once to move materials from a nearby property to Groth's property. (*Id*., pp. 46:7-47:25, 63:11-64:12, 130:7-23, 135:22-25.)

He identified six people for whom he performed work during the period of 2006 until he began work for Groth in 2013. (*Id*., pp. 116:17-117:17.)

On the day of the accident, he accompanied Mr. Helbig on the ATV to an entry gate on the property, and Mr. Helbig told him to drive the ATV back to the residential area because he wanted to stay and make cellular telephone calls there by himself. (*Id*., p. 161:9-17.) The turnoff to the bluff where he was injured is approximately a quarter mile from the driveway to Groth's residence. (*Id.*, p. 153:3-7.)

Applicant's testimony regarding the accident in which he was injured is as follows:

> Q. Mr. Helbig asked you to drive the ATV back?
> A. Correct.
>
> Q. Okay. Then what happened?
> A. Then I drove all the way back to the house. Right before the house, I wanted to take a little loop going to—up in the little bluff.
>
> Q. Why?
> A. Because two reasons. First of all, I was told all the time the view is magnifique up there and—or magnificent. And also the reception is much better. So I was going to make phone calls and Skype from that point.

THE COURT: You still had the minor child with you?
THE WITNESS: Correct.
. . .
Q. BY MS. RANDMAA: Was this still in the middle of your workday?
A. Yes.
. . .
Q. Okay. And then what happened?
A. Then when I was about to reach the last part of the bluff, going up the hill, I ask the child to disembark. I thought it was not safe for him to stay on the ATV. So he run up the bluff as I asked him, and I drove the ATV up the hill.
(*Id*., pp. 67:6-68:5.)

Q. It's okay.
A. And I ask the child to disembark because the hill was a little steep, probably, to have a child on the ATV, and I ask him to go walking up the hill and meet me up there. We are talking a few feet. It's not a big one. And he did. He reached the top. And I pressed the throttle enough to gain the momentum to get up the hill, but when I was about to arrive, a few feet before that, the child turned right and crossed my way and was right in front of me, and I had to stop, and I did. Otherwise, I was going to run over the kid.

Q. How did you stop?
A. I just pressed brakes, both.

THE COURT: And then what happened?
THE WITNESS: I said (sic) to turn around and come back. I wanted to turn around and come back down to straighten the ATV just to go back up the hill, but I couldn't do that. At that moment the ATV was sinking in the back, probably because the tires were flat. And one of the shock absorbers was broken, so the ATV started lifting the front wheels at the moment I was trying to accelerate the turn.

THE COURT: As you started to accelerate to turn, what happened?
THE WITNESS: The ATV flipped backwards.
(*Id*., pp. 70:4-71:1.)

And prior to the accident, had Ms. Groth or any of her supervisors ever instructed you not to drive the ATV up this hill?
A: No.
(*Id*., p. 72:22-25.)

Q. BY MS. RANDMAA: And have you ever been instructed by Ms. Groth or any of her supervisors not to go on this bluff?
A. No.

Q. Were you planning on performing more work once you completed those phone calls on the hill on the day of your accident?
A. Oh, yes.
(*Id*., p. 79:17-23.)

The matter proceeded to continued trial on October 17, 2018 and December 19, 2019. (Transcript of Proceedings, October 17, 2018; Transcript of Proceedings, December 19, 2018.)

On December 19, 2018, Bergitta Groth testified as follows:

THE COURT: So his duties were confined to one parcel?
THE WITNESS: Correct.
. . .
THE COURT: He never went over there to get tools? He never went over there to get equipment? He never went over there to get anything; is that correct?
THE WITNESS: He went there one time.

THE COURT: Then I guess it wasn't confined to just –
THE WITNESS: But it was not to get tools. It was not necessary to go there for tools or supplies.

THE COURT: Okay. No. 1, when the Court is speaking, you're not. The question was, were his duties confined – by your attorney, were the duties confined to the one parcel? Now you're telling me there was at least one time where he did go to the other parcel, correct?
THE WITNESS: Not for work duty.
. . .
THE COURT: Sir, all I know is that according to the witness, the applicant drove to the property and was told by Ms. Groth to go to the other property and unload the grow lights and store them there; is that accurate?
THE WITNESS: Yes.

THE COURT: Then when you say no on the record and your witness says yes, the Court has an issue.
MR. GRAY: I understand.

THE COURT: So my point is, in fact, the applicant did go to the other property, and it wasn't just confined. Even if it's one time, it's not confined.
(Transcript of Proceedings, December 19, 2018, pp. 47:7-49:8.)

On March 11, 2019 and March 18, 2019, respectively, Groth and UEBTF filed and served their Petitions. The proof of service for Groth's Petition shows that service was effected upon applicant's attorney and not applicant. (Proof of Service, March 11, 2019.) UEBTF's proof of service also shows that service was effected upon applicant's attorney and not applicant. (Petition, March 18, 2019, p. 17.)

In the Report, the WCJ states:

> On the day of the accident, Applicant met the solar representative at the gate and escorted him to the residential portion of the property. After the solar representative was done, Applicant went down to the gate with the solar representative, Mr. Helbig and GROTH's son. Mr. Helbig told Applicant that Mr. Helbig was going to stay down near the gate to make some phone calls and told Applicant to drive the ATV back with GROTH's son.
>
> Five total witnesses testified at trial. Applicant was the only witness for Applicant and Defendant produced four witnesses. The most credible witness was Applicant; both in the details of the incident, which were supported by his direct and cross-examination at the trial, as well as his previous testimony and the consistency as to the facts of the occurrence. Further, Mr. Helbig's deposition testimony, which the parties jointly allowed into evidence, further supported Applicant version of the events.
>
> Two of the other witnesses were GROTH's son and daughter. Neither were credible. They differed in the stories they told, who was where and when, what they saw, and whether they used the ATV. They changed their testimony at times and were constantly looking to their Mother GROTH for approval to assure they were testifying the way she wanted.
> Both appeared to have an antagonistic attitude towards Applicant, the Court and the process. They were clearly not testifying in an independent manner. Tara Katz testified she was close friends with the owner and did not like Applicant, and her testimony was viewed with skepticism.
> . . . .
> Applicant had used the ATV prior. It was kept out in the open with the keys in it. There was credible testimony and evidence at least three (3) different persons used and drove the ATV. It was used for transportation on the property for harvesting and transporting tools, equipment, supplies around the property.
>
> On the day of the accident, it is unrefuted that Mr. Helbig, who had apparent authority, told Applicant to drive the vehicle back up to the residential portion of the property. The fact that Applicant drove to a different part of the property does not take it out of the scope of his employment. There was a benefit conferred on the employer by having Applicant drive the ATV back. There was a minor deviation, which appears to have been foreseeable since Applicant was advised

> by others as to the view from the top of the path. Therefore, the accident did occur within the course and scope of his employment.
>
> The only credible evidence as to wages was the testimony of Applicant and the supporting documentation. The only other testimony on wages came from GROTH, who had no documentary evidence as to the agreed upon hourly wage and the number of hours or days worked and confirmed the hourly wage Applicant testified to. Lastly, there was no W-2 form, W-4 form or 1099 form or any other document presented by Defendant contesting Applicant's testimony as to hours worked, days worked or how long the position was going to last. Additionally, no documentation was presented to reflect the position Applicant was hired to perform or the duties of the job.
> (Report, pp. 2-5.)

DISCUSSION

Pursuant to section 5905, a party petitioning for reconsideration is required to serve a copy of the petition upon all adverse parties. (§ 5905.) Failure to file proof of such service constitutes grounds for dismissing the petition. (Cal. Code Regs., tit. 8, former § 10850, now § 10940.) Here, Groth's proof of service shows that she failed to serve the Petition upon applicant. (Proof of Service, March 11, 2019.) UEBTF's proof of service also shows that it failed to serve the Petition upon applicant. (Petition, March 18, 2019, p. 17.) Thus, Groth and UEBTF failed to properly serve their respective petitions, and we admonish them to comply with all service requirements applicable to these proceedings. (See § 5905; Cal. Code Regs., tit. 8, former § 10850, now § 10940.) However, because the proofs of service show that applicant's attorney was served with copies of the Petitions, we are unable to conclude that applicant sustained prejudice. Accordingly, we decline to dismiss the Petitions.

Turning to the merits of the Petitions, we observe that California has a no-fault workers' compensation system. With few exceptions, all California employers are liable for the compensation provided by the system to employees injured or disabled in the course of and arising out of their employment, "irrespective of the fault of either party." (Cal. Const., art. XIV, § 4.) The protective goal of California's no-fault workers' compensation legislation is manifested "by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.'" (§§ 3351, 5705(a); *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354 [54 Cal.Comp.Cases 80].)

An "employee" is defined as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." (§ 3351.) Any person rendering service for another, other than as an independent contractor or other excluded classification, is presumed to be an employee. (See § 3357.) Once the person rendering service establishes a prima facie case of "employee" status, the burden shifts to the hirer to affirmatively prove that the worker is an independent contractor. (*Cristler v. Express Messenger Sys. Inc*. (2009) 171 Cal.App.4th 72, 84 [74 Cal.Comp.Cases 167] (*Cristler*); *Narayan v. EGL, Inc*. (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724] (*Narayan*).) Consequently, all workers are presumed to be employees unless the hirer can demonstrate that the worker meets specific criteria to be considered an independent contractor.

Notwithstanding the above, section 3600 imposes liability on an employer for workers' compensation benefits only if its employee sustains an injury "arising out of and in the course of employment." An employer is liable for workers' compensation benefits, where, at the time of the injury, an employee is "performing service growing out of and incidental to his or her employment and is acting within the course of employment." (§ 3600(a)(2).) The determination of whether an injury arises out of and in the course of employment requires a two-prong analysis. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].)

First, the injury must occur "in the course of employment," which ordinarily "refers to the time, place, and circumstances under which the injury occurs." (*LaTourette v. Workers' Comp. Appeals Bd.*, *supra*, 63 Cal.Comp.Cases at page 256.) An employee is acting within "the course of employment" when "he does those reasonable things which his contract with his employment expressly or impliedly permits him to do." (*Id*.) In other words, if the employment places an applicant in a location and he or she was doing an activity reasonably attributable to employment or incidental thereto, an applicant will be in the course of employment and the injury may be industrially related. (*Western Greyhound Lines v. Ind. Acc. Com.* (*Brooks*) (1964) 225 Cal.App.2d 517 [29 Cal.Comp.Cases 43].)

Second, the injury must "arise out of" the employment, "that is, occur by reason of a condition or incident of employment."[2] (*Employers Mutual Liability Ins. Co. of Wisconsin v.*

[2] We note that there appears to be no dispute here as to whether applicant sustained injury arising out of employment. The facts demonstrate a causal link between applicant's employment and his injury in that the injury occurred as a consequence of a series of acts incidental to his employment.

I.A.C. (*Gideon*) (1953) 41 Cal.2d 676 [18 Cal.Comp.Cases 286, 288].) "[T]he employment and the injury must be linked in some causal fashion," but such connection need not be the sole cause, it is sufficient if it is a "contributory cause." (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729 [48 Cal.Comp.Cases 326, 329].)

The burden of proof rests on the party holding the affirmative of the issue, which must be met by a preponderance of the evidence. (§§ 5705, 3202.5.) Applicant therefore has the affirmative burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment.

As to defendants' contention that the evidence fails to establish that applicant sustained injury AOE/COE, we evaluate whether the record evidence demonstrates that applicant sustained injury in a location at which he was placed by his employment and while engaged in an activity reasonably attributable to his employment.

Here, applicant had been working for Groth for approximately six weeks when he was injured. (Transcript of Proceedings, August 15, 2018, p. 21:3-19.) His work involved performing maintenance and harvesting tasks, including driving the ATV on approximately two occasions to Groth's garage for the purpose of transporting harvested plants. (*Id*., pp. 63:11-64:12.) In addition, he had occasion to drive the ATV out of a ditch for Mr. Helbig and to transport materials from a nearby property to Groth's property. (*Id*., pp. 130:7-23, 135:22-25.)

On the day of the accident, Mr. Helbig was driving the ATV to an entry gate on Groth's property when he asked applicant to accompany him. (Minutes of Hearing and Summary of Evidence, August 15, 2018, pp. 2:8-11, 67:6-68:5, 161:9-17.) Mr. Helbig then drove applicant and Groth's minor son to the gate. (*Id*.) After they arrived, Mr. Helbig decided to remain in the gate area by himself and asked applicant to return the ATV to the garage. (*Id*., Report, p. 5) Applicant then drove the ATV back toward the garage with Groth's son as his passenger. (*Id*., pp. 67:6-68:5.) As he was returning the ATV, applicant decided to drive to the top of a bluff so that he could see the view and make telephone calls at a location where cellular reception was "much better." (*Id*.) Applicant began driving up the bluff, stopped the ATV where the terrain became steep near the top, and asked Groth's son to disembark and walk the rest of the way because it was "not safe" for him on the ATV. (*Id*., pp. 70:4-71:1.) After applicant started driving again, Groth's son stepped in front of the ATV and applicant hit the brakes, flipping it backwards. (*Id*.)

Although this record shows that applicant strayed from the direct route of return to the residential area of Groth's property, we agree with the WCJ's reasoning that his deviation was minor and that he sustained injury in a location at which he was placed by his employment. (Report, p. 5.) In particular, the record reveals that the bluff was situated approximately a quarter mile from the garage to which applicant was to return the ATV, in an area where employees were permitted and were informed provided a magnificent view and strong cellular telephone reception. (*Id*.; Transcript of Proceedings, August 15, 2018, pp. 67:6-68:5, 72:22-25, 79:17-23, 153:3-7.)

Furthermore, applicant's drive to the bluff was reasonably attributable to his employment in that he was engaged in a task, i.e., returning the ATV at the request of Groth's employee, Mr. Helbig, similar to those he had previously performed for Groth, including driving the ATV to transport harvested plants, remove it from a ditch, and transport materials from a nearby property. (Transcript of Proceedings, August 15, 2018, pp. 63:11-64:12, 130:7-23, 135:22-25; see, e.g., *Williams v. Workers' Comp. Appeals Bd.* (1974) 41 Cal.App.3d 937 [39 Cal.Comp.Cases 619] (holding a travel agency employee in the process of delivering tickets and collecting money who was injured in a collision at the end of a high speed chase by a pursuing policeman sustained injury while in the course of employment because illegal or even criminal conduct does not necessarily remove an employee from the course of his employment); see also *THG, Inc., Safeco Insurance Company v. Workers' Comp. Appeals Bd.* (*Anderson*) (2001) 66 Cal.Comp.Cases 1436 (holding that an employee's act in exiting a hotel through an unauthorized door, although perhaps unwise, did not constitute a departure from the course of employment); *Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 568 [49 Cal.Comp.Cases 772] (holding that performing "a minor personal task . . . is a 'normal human response[]' . . . [and] within the reasonable contemplation of the employment contract.").)

Having determined that applicant sustained injury in a location at which he was placed by his employment and while engaged in an activity reasonably attributable to his employment, we nevertheless address UEBTF's argument that applicant's injury occurred outside of his employment because he failed to establish that application of the bunkhouse rule is warranted.

The bunkhouse rule is as follows:

> Where the employment contract contemplates, or the work necessity requires that the employee live or board on the employer's premises, the employee is considered to be performing services incidental to such employment during the time he is on such premises. If, under

> such circumstances, he is injured or killed while making a reasonable use of the premises, even in his leisure time, he is considered to be acting within the course of his employment . . . (*Aubin v. Kaiser Steel Corp*. (1960) 185 Cal.App.2d 658, 661 [25 Cal.Comp.Cases 217].)

In other words, the bunkhouse rule is an extension of the general rule that, where an employee is injured while on the employer's premises as contemplated by the employment contract or the necessity of work, the employee will be compensated. (*Rosen v. Industrial Acc. Com*. (1966) 239 Cal.App.2d 748, 750 (*Rosen*); *Aubin*, *supra*, 185 Cal.App.2d at p. 661.) One rationale behind the bunkhouse rule is an employee's reasonable use of the employer's premises constitutes a portion of the employee's compensation. (See, e.g., *Truck Ins. Exchange v. Ind. Acc. Com.* (1946) 27 Cal.2d 813, 819; *Aubin*, *supra*, at p. 661.)

In this case, however, applicant was being paid while he accompanied Mr. Helbig to the entry gate area and drove the ATV back to the residential area at Mr. Helbig's request, and he expected to resume his other tasks after he returned the ATV. (Transcript of Proceedings, August 15, 2018, pp. 28:19-29:15, 67:6-68:5, 79:17-23.) It follows that applicant sustained injury on Groth's premises out of the necessity of work—and not out of his off-hours use of the premises for recreational activity. Thus, applicant sustained injury in the course of employment under circumstances not giving rise the bunkhouse rule.

We also address UEBTF's argument that applicant could not have intended to make calls on the bluff because he could have remained at the entry gate as Mr. Helbig had done to make his own calls.[3] However, UEBTF cites no evidence to suggest Mr. Helbig's use of the gate to make his calls rendered that area preferable to the bluff. To the contrary, the record shows that Mr. Helbig told applicant that he wanted to stay in the area by himself, and thus suggests that the bluff was a preferable location for applicant to make his calls. (Transcript of Proceedings, August 15, 2018, p. 161:12-14.)

[3] UEBTF asserts that if applicant's testimony that he drove to the bluff to make telephone calls "is to be believed," then the personal comfort doctrine could apply. (Petition, p. 10:25-26.) The personal comfort doctrine provides that "acts of the employee for his personal comfort and gain while at work, even though performed off the employer's premises, may not interrupt the continuity of employment . . . ." (*Western Greyhound Lines v. Ind. Acc. Comm.* (*Brooks*) (1964) 225 Cal.App.2d 517, 520 [29 Cal.Comp.Cases 43].) In this case, inasmuch as applicant's injury occurred on Groth's premises and the evidence shows that applicant did not otherwise deviate from his employment, we are unable to discern how applicant's injury could be subject to the personal comfort doctrine.

In addition, the WCJ determined that applicant testified credibly, including with regard to his reasons for driving the ATV to the bluff. (Report, p. 3.) By contrast, the WCJ regarded the testimony of Groth's four witnesses as not credible. (*Id*.) We give these credibility determinations great weight because the WCJ had the opportunity to observe the witnesses' demeanor at trial. (See *Garza v. Worker's Comp. Appeals Bd*. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].)

UEBTF also contends that applicant sustained injury while he was engaged in an unauthorized activity, i.e., joyriding, and therefore sustained injury outside of his employment. In *Westbrooks v. Workers' Comp. Appeals Bd.* (1988) 203 Cal.App.3d 249 [53 Cal.Comp.Cases 157], the Court of Appeals stated:

> Employee misconduct, whether negligent, willful, or even criminal, does not necessarily preclude recovery under workers' compensation law. In the absence of an applicable statutory defense, such misconduct will bar recovery only when it constitutes a deviation from the scope of employment. (See *Traub v. Board of Retirement* (1983) 34 Cal.3d 793, 799-800 [195 Cal.Rptr. 681, 670 P.2d 335]; *Wiseman v. Industrial Acc. Com*. (1956) 46 Cal.2d 570, 572-573 [297 P.2d 649]; *Associated Indem. Corp. v. Ind. Acc. Com*. (1941) 18 Cal.2d 40, 47 [112 P.2d 615]; 1A Larson, Workmen's Compensation Law (1985) §§ 30.00, 35.00.) In determining whether particular misconduct takes an employee outside the scope of his employment, *"*A distinction must be made between an unauthorized departure from the course of employment and the performance of a duty in an unauthorized manner. Injury occurring during the course of the former conduct is not compensable. The latter conduct, while it may constitute serious and willful misconduct by the employee (Lab. Code, § 4551), does not take the employee outside the course of his employment." [Citations omitted.]

In other words, "[w]here an employee is in the performance of the duties of his employer, the fact that the injury was sustained while performing the duty in an unauthorized manner or in violation of instructions or rules of his employer does not make the injury one incurred outside the scope of employment." (*Williams v. Workers' Comp. Appeals Bd.* (1974) 41 Cal.App.3d 937 [39 Cal.Comp.Cases 619, 621].) Thus, if an employee's injury occurs in the performance of a duty, albeit in a manner outside the ordinary custom and practice of performing that duty, the injury has occurred within the sphere of the employment. (See *Id*.)

On the other hand, the employee's injury is not compensable if it occurred while the employee made an unauthorized departure from the course of the employment or deviated from

his duties, and defendants hold the burden of proof to establish the injury was unconnected to the employment. (*Rockwell International v. Workers' Comp. Appeals Bd.* (*Haylock*) (1981) 120 Cal.App.3d 291 [46 Cal.Comp.Cases 664]; *City of Los Angeles v. Workers' Comp. Appeals Bd.* (*Rivard*) (1981) 119 Cal.App.3d 633 [46 Cal.Comp.Cases 625]; *Pacific Tel. & Tel. Co. v. Workers' Comp. Appeals Bd.* (1980) 112 Cal.App.3d 241 [45 Cal.Comp.Cases 1127].)

Here, UEBTF argues that it was not necessary for applicant to accompany Mr. Helbig to the entry gate, to drive to the bluff, or to request Groth's son to disembark from the ATV unless applicant was engaged in off-duty recreational activity.[4] However, UEBTF cites no evidence to suggest that applicant was not permitted to accompany Mr. Helbig to the entry gate, that Mr. Helbig did not ask him to return the ATV, or that applicant requested Groth's son to disembark from the ATV so that he could commence joyriding.

Given that the record shows that applicant was being paid while he accompanied Mr. Helbig and drove the ATV back to the residential area, and given that applicant expected to resume his other tasks after returning the ATV, we are unable to discern evidence showing that he was engaged in off-duty recreational activity at the time of his accident. (Transcript of Proceedings, August 15, 2018, pp. 28:19-29:15, 67:6-68:5, 79:17-23; see § 3600(a)(2); *Duncan v. Workers' Comp. Appeals Bd.* (1983) 150 Cal.App.3d 117, 121 [49 Cal.Comp.Cases 39, 42].)

In sum, there is no substantial evidence that applicant's activity was so removed from his employment duties as to support a finding that his activity constituted a deviation from his employment. Accordingly, we are persuaded that the WCJ correctly found that applicant sustained injury AOE/COE.

We next address UEBTF's contention that the WCJ erred by calculating applicant's AWE without accounting for earnings he may have received prior to his employment by Groth. In this regard, we observe that section 4453(c) provides four methods for calculating average weekly earnings for the purpose of determining temporary and permanent disability indemnity. (§ 4453(c)(1)-(4).) Section 4453(c) provides, in pertinent part, as follows:

[4] UEBTF also argues that applicant must have been joyriding because he testified that Groth told him not to drive the ATV. (Petition, p. 11:21-22.) This argument misstates the evidence: As the transcript makes clear, applicant testified that Groth told him that the ATV was to be ridden "only for work" and not for "personal . . . enjoyment purposes." (Transcript of Proceedings, August 15, 2018, pp. 59:11-15, 61:12-16, 75:8-15.) Applicant further testified that Groth never told him not to use the ATV without permission, but rather that he was not to use it for "joyrides or personal things." (*Id*., p. 161:18-24.)

> (4) Where the employment is for less than 30 hours per week, or **where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied**, the average weekly earnings shall be taken at 100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his or her injury, **due consideration being given to his or her actual earnings from all sources and employments**.
> (§ 4453(c)(4) [emphasis added].)

In this case, applicant claims average weekly earnings of $1,933.88 based upon his testimony, timesheet, and County rental data. (Transcript of Proceedings, August 15, 2018, pp. 2:19-3:5.) However, applicant testified that he performed work for six other people from 2006 until September 2013, when he began working for Groth. (Transcript of Proceedings, August 15, 2018, pp. 23:3-19, 114:6-118:11.) Inasmuch as the parties did not present evidence of applicant's earnings from these sources and employments, the WCJ determined applicant's AWE without considering them. (Report, p. 5.) Nonetheless, we are persuaded that the record is insufficient to establish a reasonable and fair calculation of applicant's AWE. Accordingly, we will amend the F&A to defer the issue of the amount of applicant's AWE and return the matter to the trial level for further development of the record regarding the issue. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

We next address Groth's contention that the WCJ effectively acted as an advocate for applicant in violation of the right of due process. In this regard, we observe that all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157–158 [65 Cal.Comp.Cases 805].) Due process requires that a party be provided with reasonable notice of the proceedings and an opportunity to be heard. (*Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 711–712 [57 Cal.Comp.Cases 230].) A failure to provide sufficient notice, which deprives the meaningful opportunity to object or present evidence, is a violation of due process of law. (See *Fortich v. Workers' Comp. Appeals Bd.* (*Fortich*) (1991) 233 Cal.App.3d 1449, 1452–1454 [56 Cal.Comp.Cases 537]; see also *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 175 [36 Cal.Comp.Cases 93, 102].)

Without citing supporting authority or asserting how the WCJ's conduct could have caused her prejudice, Groth argues that the WCJ asked questions of her at trial as though he were an advocate for applicant. The record shows that the WCJ asked Groth questions regarding an apparent contradiction in her testimony: how she could testify on one hand that applicant's duties were confined to the residential area of her property and on the other that she instructed him to store materials at a nearby property. (See Transcript of Proceedings, December 19, 2018, pp. 47:7-49:8.) However, these questions do not suggest that the WCJ deviated from his role of finder of fact and we are unpersuaded that Groth was deprived of a fair hearing.

Moreover, we observe that disqualifying prejudice may not be shown based upon the WCJ's expression of an unqualified opinion on the merits if the opinion is "based upon the evidence then before [the WCJ] and upon the [WCJ's] conception of the law as applied to such evidence." (*Taylor v. Industrial Acc. Com.* (*Thomas*) (1940) 38 Cal.App.2d 75, 79-80 [5 Cal.Comp.Cases 61].)[5] Similarly, "when the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies" the judge. (*Kreling*, *supra*, 25 Cal.2d at p. 312; see also *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219.) It follows that the WCJ's communications regarding the apparent contradiction in Groth's testimony do not evidence prejudice for which he may be disqualified.

Additionally, we recognize that mere informality in the procedure in which witness testimony is elicited cannot serve as a basis to invalidate a WCJ's decision. (See § 5709.) Accordingly, we are unable to discern legal or evidentiary support for Groth's contention that the WCJ violated her right of due process or that his statements at trial suggest that he maintained bias against her.

Accordingly, we will affirm the F&A, except that we will amend to defer the issue of the amount of applicant's AWE and return the matter for further proceedings consistent with this decision.

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[5] Overruled on other grounds in *Lumbermen's Mut. Cas. Co. v. Industrial Acc. Com.* (*Cacozza*) (1946) 29 Cal.2d 492, 499 [11 Cal.Comp.Cases 289].

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Award issued on February 22, 2019 is **AFFIRMED,** except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. The issue of applicant's average weekly earnings is deferred.

* * *

IT IS FURTHER ORDERED THAT this matter is hereby **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 13, 2021

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

GUSTAVO RITTERSTEIN
LAW OFFICE OF RANDMAA & BUIE
OFFICE OF THE DIRECTOR-LEGAL UNIT
TIMOTHY NOAL GRAY, ATTORNEY AT LAW
UNINSURED EMPLOYERS BENEFITS TRUST FUND

SRO/ara

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