WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANCISCO CHAN VALENZUELA, *Applicant*

vs.

ILINK BUSINESS MANAGEMENT;
ZURICH, administered by COTTINGHAM BUTLER, *Defendants*

Adjudication Number: ADJ15467286
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact issued by a workers' compensation administrative law judge (WCJ) on December 11, 2023 (decision), wherein the WCJ found that, on October 19, 2021, applicant "sustained injury to his right ankle while performing his job duties, and was not acting outside the scope of his job duties."

Defendant contends that the WCJ's findings are not supported by the evidence, as they were based upon applicant's non-credible testimony. Defendant contends that the evidence shows that, at the time of applicant's injury, he was engaged in "horseplay," rather than his job duties. Defendant thus asserts that the WCJ should have issued a take-nothing order on applicant's claim.

We received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration,[1] the Answer, and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration to amend the WCJ's Findings of Fact so that they conform to the standard of compensability for industrial injury, i.e., injury arising out of and in the course of employment (AOE/COE). We will also include a finding that all other

[1] We accept defendant's supplemental petition of February 8, 2024. (Cal. Code Regs., tit. 8, § 10964.)

issues are deferred. We will otherwise affirm the WCJ's decision for the reasons stated in the Report, which we adopt and incorporate, as provided herein.[2]

DISCUSSION

As noted above, in the Findings of Fact, WCJ concluded that, on October 19, 2021, applicant sustained injury to his right ankle "while performing his job duties, and was not acting outside the scope of his job duties." (Findings of Fact, December 11, 2023, p. 1.) However, in the workers' compensation system, the condition of compensation is not whether an employee sustained injury while acting within (or outside of) the "scope of their job duties," but rather, whether the injury "[arose] out of and in the course of the employment," as provided in Labor Code section 3600.[3] During trial, the parties admitted to this standard of compensability, stating:

<u>The Following Facts Are Admitted:</u>

> 1. Francisco Chan Valenzuela, born [], while employed on 10-19-2021, as a general laborer...by ILink Business Management, claims to have sustained injury *arising out of and in the course of employment* to right ankle, right foot, right tibia, and right lower leg.

(Minutes of Hearing, June 20, 2023, p. 2, Admitted Fact No. 1, emphasis added.)

The WCJ also analyzed applicant's claim using this standard in his Opinion on Decision, stating: "... the starting point of analysis is California Labor Code Section 3600. According to L.C. § 3600, liability is imposed on an employer for workers' compensation benefits only if an employee sustains an injury 'arising out of and in the course of employment.'" (Opinion on Decision, December 11, 2023, p. 1, quoting Lab. Code, § 3600; see also Report, pp. 4-8.)

We will also include a Finding of Fact noting that all other issues in the case are deferred. The only issue decided by the WCJ in the December 11, 2023 decision was whether applicant sustained industrial injury on October 19, 2021; this decision had the effect of deferring all other issues submitted for adjudication in the case. (See Cal. Code Regs., tit. 8, §§ 10330, 10787(a); see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 57 Cal.App.4th 389, 392 [62 Cal.Comp.Cases

---

[2] We do not adopt and incorporate the section of the WCJ's Report titled "Should Applicant's Petition be a Petition for Removal?" (Report, pp. 2-3.) The WCJ's December 11, 2023 decision includes a finding of industrial injury. (Findings of Fact, December 11, 2023, p. 1; Opinion on Decision, December 11, 2023, p. 1.) Industrial injury is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal, and the WCJ's discussion regarding removal is unnecessary.

[3] All further references are to the Labor Code unless otherwise noted.

924] ["Labor Code sections 5701 and 5906 authorize the WCJ and WCAB to obtain additional evidence...at any time during the proceedings."].)

For the foregoing reasons, we grant defendant's Petition for Reconsideration of the WCJ's December 11, 2023 decision. As our Decision After Reconsideration, we amend the WCJ's Findings of Fact to conform to the standard for compensable industrial injury set forth in section 3600 and to include a finding that all other issues submitted for trial are deferred. The WCJ's decision of December 11, 2023 is otherwise affirmed.

For the foregoing reasons,

IT IS ORDERED that defendant's petition for reconsideration of the WCJ's decision of December 11, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the WCJ's decision of December 11, 2023 is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Francisco Chan Valenzuela, while employed on October 19, 2021, as a general laborer, occupation group number in dispute, at Rialto, California, by ILink Business Management, whose insurance carrier was Zurich, sustained injury arising out of and in the course of employment to his right ankle and claims to have sustained injury arising out of and in the course of employment to right ankle, right foot, right tibia, and right lower leg.

2. All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 1, 2024

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

FRANCISCO CHAN VALENZUELA
ESPINOZA LAW GROUP
BERNAL & ROBBINS

AH/*cs*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

Petitioner, Defendant, filed a signed, verified, and timely, Petition for Reconsideration. asserting:

1) "The WCJ erred in finding that the Applicant sustained injury to his right ankle while performing his job duties and was not acting outside the scope of his job duties, by making findings of fact without considering the Applicant's significant credibility issues, which strongly suggested the Applicant was not engaged in performing job duties for the benefit of the employer but was engaged in horseplay; and

2) Public policy and the law require that an Applicant must come to the Court with candor and honesty, and any benefit of the doubt should not be extended under Labor Code 3202 when there is such unequivocal indifference to that requirement by the Applicant."

(Petition For Reconsideration, 1/4/2024, pg. 2).

II.
STATEMENT OF FACTS

On February 28, 2022, Defendant filed a Declaration of Readiness to Proceed, among other things, asserting Applicant's activity was outside the scope of his employment, and were therefore non-industrial in nature. **(EAMS DOC ID 40307816).** After numerous continuances, day 1 of trial commenced on June 20, 2023, and was ultimately continued for testimony. **(EAMS DOC ID 76881067).** On September 27, 2023, day 2 of trial was conducted, with Applicant providing testimony, and the matter ultimately being continued for additional testimony. **(EAMS DOC ID77219355).** On November 8, 2023, day 3 of trial was conducted, with the Applicant and an employer witness providing testimony, and the matter ultimately being submitted. **(EAMS DOC ID 77361498).**

On November 9, 2023, the undersigned issued an Opinion on Decision **(EAMS DOC ID 77439100),** and Findings of Fact **(EAMS DOC ID 77439108),** which Defendant now challenges via a Petition for Reconsideration. **(EAMS DOC** ID **49803222).**

II.
DISCUSSION

Defendant's contention that Applicant was engaged in horseplay when he sustained injury to his right ankle, and is therefore not entitled to benefits

In the Petition for Reconsideration, Defendant asserts Applicant was engaged in "horseplay" at the time of his injury, and therefore the findings of fact are without justification. **(Petition For Reconsideration, 1/4/2024, pg. 6, lines 9-10).**

In the instant case, the record clearly demonstrates the Applicant sustained an injury to his right ankle on 10/19/21. A fact supported by the testimony and stipulation of the parties. **(MOH/SOE, June 20, 2023, pg. 2, lines 16-20).**

According to the Applicant, his job duties included cleaning, picking up papers, picking up plastic, picking up cardboard, and filling containers. **(MOH/SOE, September 27, 2023, pg. 2, lines 24-25).** Also according to the Applicant, although he was to utilize a manual pallet jack at work to transport trash cans, he utilized an electric pallet jack in order to perform his work duties faster. **(MOH/SOE, September 27, 2023, pg. 3, lines 1-2).** When Applicant was performing his job duties with the electric pallet jack, he failed to remove a finger from a button on the pallet jack, he ran into a steel wall, injuring his foot. **(MOH/SOE, September 27, 2023, pg. 3, lines 10-13).**

According to the testimony of employer witness Cristina Rojas, ILink Director of Risk Management, who is familiar with the Applicant, the Applicant was hired by ILink, to work with a manual pallet jack at Hillman. **(MOH/SOE, September 27, 2023, pg. 3, lines 22-24).** Also according to Ms. Rojas, the Applicant was prohibited from utilizing the electric pallet jack. **(MOH/SOE, September 27, 2023, pg. 4, lines 14-15).**

The record further demonstrates that the Applicant has given several conflicting versions of events in relation to the cause of his injury. It is because of these versions, that Defendant asserts the Applicant is not credible, and therefore should not be entitled to benefits.

If the Applicant was not injured, and was lying about being hurt, the Defendant's assertion would be more credible. It the Applicant was injured while engaged in "horseplay," the Defendant's assertion would be more credible. However, the facts do not support Defendant's conclusion.

The record in the instant case does support the conclusion that the Applicant was injured. The record further supports the fact that when the Applicant was injured, he was at his work location, during his work day, performing his job duties related to moving trash cans. It is also

clear from the evidence that the Applicant was utilizing an electric pallet jack to perform his duties, and should have been utilizing a manual pallet jack. The fact that the Applicant gave different versions about the type of pallet he was operating does not allow defendant to deny benefits. Regardless of the numerous versions of events offered by the Applicant, the Defendant failed to present any evidence tending to support a conclusion that the Applicant was engaged in "horseplay," rather than his job duties.

Defendant's contention that Public policy and the law require that an Applicant must come to the Court with candor and honesty, and any benefit of the doubt should not be extended under Labor Code 3-202 when there is such unequivocal indifference to that requirement bv the Applicant."

Having read Defendant's Petition for Reconsideration several times, it appears Defendant is asserting that because the Applicant was untruthful at various times during the investigation and trial, he should automatically be deprived of benefits he would otherwise be entitled to received.

When considering Defendant's argument, it is important to note that California has a no-fault workers' compensation system. With a 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.'" (Lab. Code, §§ 3351, 5705(a); S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341,354 [256 Cal. Rptr. 543, 769 P.2d 399, 54 Cal.Comp.Cases 80])

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 (AOE/COE). 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." (Lab. Code, § 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 [72 Cal. Rptr. 2d 217, 951 P.2d 1184, 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, 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. Industrial. 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." *(Employers Mutual Liability Ins. Co. of Wisconsin v. Industrial Acc. Com. (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 [190 Cal. Rptr. 904, 661 P.2d 1058, 48 Cal.Comp.Cases 326, 329].)*

After reviewing the entire record in the instant case, it is clear a portion of the evidence supports an argument, and perhaps even a conclusion, that the Applicant was not truthful at various stages of the internal investigation, and arguably even during trial.

It is also clear, based on the entire record in the instant case, that not all of Applicant's testimony can be considered untruthful and disregarded. More specifically, Applicant testified he " ... used a manual pallet jack at work to transport trash cans. He used an electric pallet jack at work to do that same job faster." **(MOH/SOE, September 27, 2023, pg. 3, lines 1-2).** Also uncontroverted was Applicant's testimony that he" ... was using an electric pallet jack at work when injured, he was on the pallet jack at work and never removed his finger from the bottom of the pallet jack. Due to not having training on the pallet jack, the pallet jack went into a steel wall. He injured the ankle in his right foot." **(MOH/SOE, September 27, 2023, pg. 3, lines 10-13).**

It is well established that 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. *(Brooks, supra, 225 Cal.App.2d 517.)* This principle holds especially true in cases where the applicant is being paid during the time involved. *(Id.)*

Based on the evidence submitted, it is therefore clear the Applicant met his initial burden of proof that he sustained injury AOE/COE in a location at which he was placed by his employment and while engaged in an activity reasonably attributable to that employment. The burden then shifted to defendant to rebut applicant's evidence or establish an affirmative defense.

In *Westbrooks v. Workers' Comp. Appeals Bd. (1988) 203 Cal.App.3d 249 [252 Cal. Rptr. 26, 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 lndem. Corp. v. Ind. Acc. Com. (1941) 18 Cal.2d 40, 47 /112 P.2d 615];*** 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.

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 [116 Cal. Rptr. 607, 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.

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 [175 Cal. Rptr. 219, 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 [169 Cal. Rptr. 285, 45 Cal. Comp. Cases 1127].)

In the instant case, the record clearly demonstrates the Applicant sustained an injury to his right ankle. A fact that the Defendant has stipulated to. **(MOH/SOE, June 20, 2023, pg. 2, lines 16-20).** The record also demonstrates the Applicant changed his story several times about how he was injured. More specifically, he claimed he was injured while utilizing a manual pallet jack to perform his duties, and he also claimed he was injured while utilizing an electric pallet jack to perform his duties.

The Applicant's "dishonesty" about which pallet jack he was utilizing when he was injured does not change the fact that he was injured while using a pallet jack to perform his job duties. Despite having established the Applicant was dishonest about the type of pallet jack used, it does not change the fact that the Applicant was injured, and he was injured while performing his job duties.

DATE: January 17, 2024

Michael J. Holmes
WORKERS' COMPENSATION JUDGE