**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**GUADALUPE SANCHEZ DE ARGUELLO, *Applicant***

**vs.**

**KENYON PLASTERING OF SOUTHERNCALIFORNIA INC.;**
**ACE AMERICAN INSURANCE, administered by ESIS, INC, *Defendants***

**Adjudication Number: ADJ16268116**
**San Diego 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, we will deny reconsideration.

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**January 31, 2024**

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

**GUADALUPE SANCHEZ DE ARGUELLO**
**JOHN JANSEN, ESQ.**
**COLANTONI, COLLINS, MARREN, PHILLIPS & TULK, LLP**

**AS/mc**

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

## NATURE OF PETITION

On December 12, 2023, defendant Kenyon Plastering of Southern California, insured by ACE American Insurance, administered by ESIS, Inc. filed a timely, verified Defendant's Petition for Reconsideration (hereinafter the "Petition for Reconsideration") contending that the workers' compensation judge acted without or in excess of his powers.

Applicant Guadalupe Sanchez De Arguello has not filed an opposition to the Petition for Reconsideration.

## II

## STATEMENT OF FACTS

As set forth in the Findings and Award and Opinion on Decision issued on November 11, 2023, the facts of the case are not in dispute. Ms. Sanchez was employed with Kenyon Plastering of Southern California, Inc. when she was injured on March 21, 2022. (MOH/SOE, 10-26-23, 3:47-4:1.) On March 21, 2022, Ms. Sanchez was working at a construction project called The Hub. (MOH/SOE, 10-26-23, 4:8-9.) Ms. Sanchez was doing cleanup work in the garages in building one on The Hub construction site. (MOH/SOE, 10-26-23, 5:8-12, 8:44-47.) When it was time for her lunch break, Ms. Sanchez came down from her ladder and took off her tool belt. (MOH/SOE, 10-26-23,5: 14-15.) She proceeded to eat lunch sitting on a curb in front of the garages where she was working. (MOH/SOE, 10-26-23, 5:24-27; Exhibit B.) Ms. Sanchez estimates the curb was approximately six to seven car lengths away from the garage where she was working prior to her lunch break. (MOH/SOE, 10-26-23, 5:26-27.).

Ms. Sanchez testified that after finishing her lunch, she put away her trash and packed up her things to prepare to go back to work. (MOH/SOE, 10-26-23, 5:38-41.)

When she was ready to go back to work, she stood up and the sun was in her eyes. (MOH/SOE, 1 q-26-23, 5:43-44.) She then stepped backward onto some rocks and a hose, twisted her right foot, and sustained fractures of her right tibia and fibula. (MOH/SOE, 10-26-23, 5:44-45; Joint Exhibit 3, pp. 2&6; Exhibit B.)

Mr. Raymond Cortez, the regional safety manager for Kenyon Plastering in southern California, testified that he encourages employees to sit in a safe area while having lunch. (MOH/SOE, 10-26-23, 10:29-30.) Mr. Cortez testified that Ms. Sanchez was permitted to eat lunch in the area where she took her lunch break. (MOH/SOE, 10-26-23, 10:28-29.) He further testified it is common for employees to eat lunch in the area around the job site. (MOH/SOE, 10-26-23, 10:30-32.) Ms. Sanchez would not have been allowed to eat her lunch in the garages where she was working just prior to her injury. (MOH/SOE, 10-26-23, 10:35-39.)

Ms. Sanchez was not paid for the time she was on her lunch break. (MOH/SOE, 10-26-23, 6:29-30; 8:25-28.)

**Ill**

**DISCUSSION**

**A. <u>Applicant Sustained an Injury to Her Right Leg Arising Out of Employment and in the Course of Employment During Her Lunch Break</u>.**

An employer is liable for workers' compensation benefits only if the employee sustains an injury "arising out of and in the course of employment." (Labor Code section 3600.) An injury arises out of employment when there is a causal connection between the injury and the job. (*Ayala v. Fruit Harves*t (2017) 82 Cal. Comp. Cases 1046.) Course of employment «ordinarily refers to the time, place, and circumstances under which the injury occurs.'" (*LaTourette v. WCAB* (1998) 17 Cal. 4th 644, 651, citing *Maher v. WCAB* 33 Cal. 3d 729, 733.)

**1. Arising Out of Employment**

An injury sustained while performing an act reasonably contemplated by the employment, given the circumstances of the particular employment, is an injury that arises out of employment. *(Ayala v. Fruit Harvest* (2017) 82 Cal. Comp. Cases 1046.) The fact that an employee is

performing a personal act when the injury occurs does not take the employee outside the protection afforded by the workers' compensation system. (Pacific Indemnity Company v. Industrial Accident Commission (1945) 26 Cal. 2d 509, 513.) The California Supreme Court in Pacific Indemnity Company provided the following test for determining when an injury arises out of employment:

> If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment, and are compensable. In determining whether a particular act is reasonably contemplated by the employment the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors should be considered. Any reasonable doubt as to whether the act is contemplated by the employment, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee. (*Pacific Indemnity Company v. Industrial Accident Commission* (1945) 26 Cal. 2d 509, 514.)

In *Pacific Indemnity Company*, the applicant was working in an orchard with no shade. During the lunch break, the applicant, his coworkers, and his supervisor walked to an orchard across the street to have lunch in the shade. Applicant fell asleep after lunch and his arm was run over by a truck driving in the orchard where he ate lunch. The California Supreme Court found a causal link between the applicant's employment and his injury. The workers needed to take a break for lunch, and it was reasonable for them to seek a shady place to have lunch on a hot day.

In the present case, Ms. Sanchez was also on a lunch break. (MOH/SOE, 10-26- 23, 5: 14-45.) She ate lunch near the area where she was working. (MOH/SOE, 10-26-23, 5:24-27.)

Mr. Cortez testified that Ms. Sanchez was permitted to eat lunch in the area where she took her lunch break. (MOH/SOE, 10-26-23, 10:28-29.) In fact, she could not eat lunch in the area of the garages where she was working, according to Mr. Cortez. (MOH/SOE, 10-26-23, 10:35-39.)

It was reasonably contemplated that Ms. Sanchez would need to take a lunch break; therefore, an injury sustained while performing the act of taking a lunch break is an injury that arises out of employment and is compensable. (*Pacific Indemnity Company v. Industrial Accident Commission* (1945) 26 Cal. 2d 509, 514.)

**[2.]B. Course of Employment**

An employee is acting within the course of employment when she is doing reasonable things expressly or impliedly permitted by her employment. (*LaTourette v.WCAB* (1998) 17 Cal. 4th 644, 651.) Under the personal comfort doctrine, an employee is not acting outside the course of employment when the employee is performing acts of personal comf9rt because such acts are helpful to the employer in that they aid in efficient performance by the employee. (*Ayala v. Fruit Harvest* (2017) 82 Cal. Comp. Cases 1046, citing *State Compensation Insurance Fund v. WCAB* (1967) 67 Cal. 2d 925, 928.) Acts of personal convenience to the employee fall within the course of employment if they are reasonably contemplated by the employment. (*Price v. WCAB* (1984) 37 Cal. 3d 559, 568.) "The personal comfort doctrine benefits the employer in increased productivity of its employees, often seen in acts such as taking a break or using the washroom. [citations omitted.]" (*Ayala v. Fruit Harvest* (2017) 82 Cal. Comp. Cases 1046.) As stated by the California Supreme Court in *Fireman's Fund Indemnity Company v. IAC* (1952) 39 Cal. 2d 529, 532-533, the rule of compensability is very broad when the employee's acts are upon the employer's premises:

> The rule is broad enough to include the majority of an employee's acts upon the employer's premises, **such as eating lunch**, getting a drink of water, smoking tobacco where not forbidden by the employer, attending to the wants of nature, changing to or from working clothes, and many others. Such acts, although not themselves representing a rendition of service, are reasonably incidental thereto, and are considered to be acts for the mutual benefit and convenience of the employer and employee. (Quoting Hanna, Industrial Accident Commission Practice and Procedure, p. 36., emphasis added.)
>
> When an employee takes a lunch break on the employer's premises, the employee does not leave the course of her employment. (*Gutierrez v. Petoseed Company* (1980) 103 Cal. App. 3d 766, 769-770.) In *Gutierrez*, five workers were injured during an uncompensated lunch break on the employer's premises. The workers filed civil lawsuits against their employer, Petoseed Company. Petoseed Company filed from summary judgment on the ground that the employees' exclusive remedy was to pursue claims under workers' compensation. Summary judgment was granted by the trial court. The employees appealed. In upholding the summary judgment granted in favor of the employer, the Court of Appeal concluded that employees on an uncompensated lunch break on the employer's premises are acting within the course of their employment and their exclusive remedy is under workers' compensation. *(Gutierrez v. Petoseed Company* (1980) 103 Cal. App. 3d 766, 769-770.) The Court in *Gutierrez* opined:
>
> As pointed out in IA Larson, Workmen's Compensation Law, sections 21.00 and 21:21(a), employees who, within the time and space limits of their employment, engage in acts which minister to their personal comfort do not thereby ordinarily

> leave the course of their employment, and therefore injuries occurring on the premises of the employer (as opposed to merely the work stations of the employees [citation omitted]) during a regular lunch break arise within the course of employment, as being incidental to such employment [citation omitted], **even though the lunch is technically outside the regular hours of employment, is uncompensated, and the employees are not then, generally speaking, under the control of their employer.** This personal comfort doctrine of compensability has long been recognized in California, even with respect to injuries to employees occurring off the premises of their employers [citations omitted], and while an injury off the premises during an uncompensated lunch break may not be compensable [citation omitted], such an injury on the employer's premises clearly is. *(Gutierrez v. Petoseed Company* (1980) 103 Cal. App. 3d 766,769-770, emphasis added.)

In the present case, Ms. Sanchez took her lunch at the construction site where she was working, i.e., she ate her lunch sitting on a curb in front of the garages where she was working. (MOH/SOE, 10-26-23, 5:24-27.) Ms. Sanchez estimates the curb was approximately six to seven car lengths away from the garage where she was working prior to lunch break. (MOH/SOE, 10-26-23, 5:26-27.) Ms. Sanchez sat at this location so she could keep an eye on her on gear. (MOH/SOE, 10-26-23, 5:29-30.) At the jobsite in question, employees were not assigned a specific area to eat lunch. (MOH/SOE, 10-26-23, 5:5-6.) Mr. Cortez testified that Ms. Sanchez was permitted to eat lunch in the area she was eating prior to her injury. (MOH/SOE, 10-26-23, 10:28-29.) He further testified it is common for employees to eat lunch in the area around the job site. (MOH/SOE, 10-26-23, 10:30-32.)

After finishing lunch and preparing to return to work, Ms. Sanchez stood up and stepped backward onto some rocks and a hose and fractured her right tibia and fibula. (MOH/SOE, 10-26-23, 5:38-45; Joint Exhibit 3, pp. 2&6.) Based on the facts of the case, Ms. Sanchez was within the scope of her employment at the time of her injury. The facts in this case establish that Ms. Sanchez sustained an injury "arising out of and in the course of employment" pursuant to Labor Code section 3600.

**[A]B. <u>Defendant is Attempting to Draw an Artificial Distinction Between a Construction Job Site and an Employer's Premises</u>.**

Defendant takes the position that the employer's premises was limited to the garages where' the applicant was working. Therefore, the instant the applicant stepped out of the garages; she was off the employer's premises. Defendant does not cite any legal authority to support its position that when an employee is on a construction jobsite, the employee is not actually on the employer's

premises. According to defendant's position, an employee is only on the employer's premises for purposes of workers' compensation, when the employee is in the area of a construction project where the employee is performing work. However, Mr. Raymond Cortez, the regional safety manager for Kenyon Plastering in southern California, testified that Ms. Sanchez would not have been allowed to eat her lunch in the garage where she was working just prior to her injury. (MOH/SOE, 10-26-23, 10:35-39.) Therefore, according to defendant's position, it was impossible for the applicant to eat lunch on the employer's premises because she was prohibited from eating in the garages where she was working.

If defendant's position were the law, then a plumber installing a fixture in the second-floor bathroom of a home would not be on the employer's premises if she tripped while walking up the driveway or if she slipped while standing outside the front door while taking her morning break. The same would be true of an employee who was walking outside the building to access the restrooms.

In the present case, the applicant testified that the restroom facility was a five- minute walk away from the garages where the applicant was working. (MOH/SOE, 10-26- 23, 6:4-7.) According to the defendant's argument, the applicant would be off the employer's premises when she took a break to use the restroom because she would have left the garages where she was working. Again, the defendant does not cite any legal authority to support its position that an employee working at a construction site is not on the employer's premises except when standing in the exact area where the work is taking place.

**[B]C. <u>The Cases Cited by Defendant are Distinguishable</u>.**

In support of its position, defendant cites multiple cases that are clearly distinguishable from the present case. In *Mission Insurance Company v. WCAB (Fitzgerald)* (1978) 84 Cal. App. 3d 50, the applicant was injured while driving in her car 1.5 miles away from work. In *Hinkle v. WCAB* (1985) 50 Cal. Comp. Cases 718, the applicant drove to his post office box, then to his credit union, and was on his way back to work when he was involved in a car accident. In *Burciaga v. Staffing Network* 2018 Cal. Wrk. Comp. P.D. LEXIS 589, the applicant was sitting in his car on a public street outside the warehouse where he worked. In *Betpera v. WCAB* (1996) 61 Cal. Comp. Cases 487 ,the applicant was walking on a public sidewalk. The one fact all of these cases have in common is the injured worker left the jobsite when he/she was injured. In the instant case, the applicant never left The Hub jobsite. In fact, at the time of her injury she was on the job site

approximately six to seven car lengths away .from the garages where she was working prior to her lunch break. (MOH/SOE, 10-26-23, 5:26-27.)

Contrary to defendant's position, the boundaries of employer's premises are broadly construed.

> The liability of an employer for injuries sustained by his employees on the employment premises is exceedingly broad. Extending his liability to the total premises is somewhat arbitrary but as a practical measure is well established. To some extent it follows from the theory that injuries to employees to which the hazards of the employment environment contribute should be charged to industry as a production cost and passed on to the consumers of the products as an inherent cost of the products.
>
> *(North American Rockwell Corp. v. WCAB* (1970) 9 Cal. App. 154, 159.)

The cases cited by defendant in its Petition for Reconsideration, do not support overturning the decision that the applicant sustained an injury arising out of and in the course of employment.

**[C]D. Defendant Attempts to Limit Its Workers' Compensation Liability by Not Providing Its Employees with a Safe Location to Take Lunch Breaks.**

Defendant makes a point of highlighting the fact that there was no designated area for its employees to take lunch breaks. (Petition for Reconsideration, 5:23-24.) Defendant believes that its failure to provide a safe location for its employees to eat lunch on construction site somehow limits its liability to its employees. To the contrary, the defendant's failure to provide a safe location for its employees to eat lunch broadens the employer's liability. For example, see, *Pacific Indemnity Company v. Industrial Accident Commission* (1945) 26 Cal. 2d 509, 514.

In *Pacific Indemnity Company*, the applicant was working in an orchard with no shade on a hot day. During the lunch break, the applicant, his coworkers, and his supervisor walked to an orchard across the street to have lunch in the shade. Applicant fell asleep after lunch and his arm was run over by a truck driving in the orchard where he ate lunch. The: California Supreme Court found a causal link between the applicant's employment and his injury. The workers needed to take a break for lunch, and it was reasonable for them to seek a shady place to have lunch on a hot day. The fact the employer did not provide a shady place for its employees to have lunch broadened the employer's liability to include an adjoining orchard; i.e., a location off the employer's premises.

In the present case, liability is even clearer than in Pacific Indemnity Company because the applicant never left the construction site. The applicant ate her lunch sitting on a curb in front of the garages where she was working. (MOH/SOE, 10-26-23, 5:24-27; Exhibit 8.) Ms. Sanchez estimates the curb was approximately six to seven car lengths away from the garages where she was working prior to her lunch break. (MOH/SOE, 10- 26-23, 5:26-27.) The defendant's own witness and regional safety manager, Raymond Cortez, testified that Ms. Sanchez was permitted to eat lunch in the area where she took her lunch break. (MOH/SOE, 10-26-23, 10:28-29.) He further testified it is common for employees to eat lunch in the area around the job site. (MOH/SOE, 10-26-23, 10:30-32.)

As a matter of public policy, employers cannot limit their workers' compensation liability by failing to provide their employees with a safe place to eat lunch on ac construction site.

## IV

## RECOMMENDATION

For the reasons set forth above, the WCJ respectfully recommends that the Petition for Reconsideration be denied.

Dated: January 2, 2024

DOUGLAS E. WEBSTER
WORKERS' COMPENSATION JUDGE