WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICARDA DURAN, AKA SONIA TINEO TOLEDO, *Applicant*

vs.

PRIORITY WORKFORCE, INC. dba MVP PAYROLL FINANCING LLC, LCF PRIORITY BUSINESS SERVICES INC.; UNITED WISCONSIN INSURANCE COMPANY administered by NEXT LEVEL ADMINISTRATORS, *Defendants*

Adjudication Number: ADJ15799667
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration of the Findings & Order (F&O) issued by a workers' compensation administrative law judge (WCJ) on December 6, 2022, wherein the WCJ found that when applicant was "hit by a car while waiting on her employer's premises for her ride home. . . . [and that] [t]he time Applicant spent waiting for her ride to take her home from work before the accident occurred was within the course and scope of her employment." Defendant contends that applicant's injury "did not occur within the course and scope of her employment" and that the "general premises liability rule" does not apply because applicant was acting in self-interest with no benefit to her employer at the time of her injury and because applicant's injury occurred while she "was 'going' home."

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the 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, and for the reasons discussed below, we will rescind the Findings and Order (F&O) and substitute a new F&O, which finds that

[1] On March 10, 2023, we granted reconsideration on our own motion and rescinded our previous Opinion and Decision After Reconsideration of March 8, 2023, due to a clerical error.

applicant sustained injury arising out of and in the course of employment (AOE/COE) to her head while employed by defendant and that all other issues are deferred.

Preliminarily, Labor Code section 3600(a) provides for liability for injuries sustained "arising out of and in the course of employment." Accordingly, "course and scope of employment" is not the correct standard, and while we agree with the WCJ that applicant's injury is compensable, we clarify the language of the F&O to comport with the statutory language. Further, the parties stipulated at the time of trial that applicant claimed injury to her head, brain, and hips, and deferred injury to other body parts. (Minutes of Hearing, Summary of Evidence, p. 2.) While applicant did not testify as to the extent of her injuries, we note that the Traffic Crash Report states that applicant was taken from the accident by ambulance and that she suffered a "laceration to the back of the head…". (Exhibit 1, p. 3.) Based on that report, we conclude that applicant sustained injury AOE/COE to her head.

An employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd*. (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.) Whether an employee's injury arose out of and in the course of employment is generally a question of fact to be determined in light of the particular circumstances of the case. (*Wright v. Beverly Fabrics* (2002) 95 Cal.App.4th 346 [67 Cal.Comp.Cases 51].) Labor Code section 3600, subdivision (a)(2) requires as a condition of compensation that "at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment."

The phrase "in the course of employment" "'ordinarily refers to the time, place, and circumstances under which the injury occurs. [citations].'" (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].) An "employee is in the 'course of employment' when he does those reasonable things which his contract with his employer expressly or impliedly permits him to do. [citations]" (*Id.* at p. 651.) For the injury to arise out of employment, it must "'occur by reason a condition or incident of [the] employment.' [citation] That is, the employment and the injury must be linked in some causal fashion. [citation]" (*Id.* at p. 651.) "'If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment, and are compensable." (*Id.* at p. 652.)

"Acts of 'personal convenience' are within the course of employment if they are 'reasonably contemplated by the employment [citations].'" (*Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 568 [49 Cal.Comp.Cases 773]) and include going to the washroom (*DeMirjian v. Ideal Heating Corp.* (1954) 129 Cal.App.2d 758). (See *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.* (1977) 69 Cal.App.3d 170, 176 [42 Cal.Comp.Cases 297]; *Vogt v. Herron Construction* (2011) 200 Cal.App.4th 643.) "[A]cts necessary to the life, comfort and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. [citations]." (*Price, supra,* at pp. 567-568.)

Thus, even if an employee is engaged in doing something purely personal at the time of injury, the employee may be considered to be performing services incidental to employment within the meaning of section 3600. Here, it is reasonably contemplated that applicant would wait in the area commonly used by the employees for their breaks, and thus the injury she sustained while waiting for her ride home would still be considered AOE/COE.

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. (Smythe)* (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]; see *also Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038 [82 Cal.Comp.Cases 692]; see also *Xiaohui Kong v. City of Hope Nat'l Med. Ctr*. (March 2, 2020, ADJ11230430) [2020 Cal.Wrk.Comp. P.D. LEXIS 118, *23].) The "going and coming rule" generally exempts injuries occurring while an employee is engaged in off-duty travel, such as a local commute en-route to and from a fixed place of business at fixed hours, although numerous exceptions to the going and coming rule exist. (*Hinojosa, supra,* at 156; *Parks, supra*, 33 Cal.3d 585 at p. 589.)

However, injuries sustained by an employee while going to or coming from the place of work upon premises owned or controlled by the employer are generally deemed to have arisen out of and in the course of the employment. (*California Casualty Indem. Exchange v. Industrial Acci. Com.* (1943) 21 Cal. 2d 751, 757-758 [8 Cal. Comp. Cases 55]; see also *Gonzalez v. Dep't of Indus. Rels.* (February 8, 2019, ADJ11121478) [2019 Cal. Wrk. Comp. P.D. LEXIS 52, *9].)

We agree with the WCJ that applicant in this case does not fall under an exception to the general premises rule stated above. Injuries of employees while in the employer's parking lot, or a nearby lot or street parking if there is no employee lot, are generally found to be compensable. (*Price v. Workers' Comp. Appeals Bd*., *supra*, 37 Cal.3d at p. 566 [finding the injury occurred within the course of the employment and was compensable where an employee was injured outside the employer's premises while changing the oil in his car and waiting to be admitted to the workplace]; *Ultramar Diamond Shamrock, Southland Claims Mgmt. v. Workers' Compensation Appeals Bd*. (2000) 65 Cal.Comp.Cases 983, 984 [2000 Cal. Wrk. Comp. LEXIS 6452] [finding injury compensable when applicant was instructed by his employer to park in the lot across the street from his work place and was injured while crossing the street].) Similarly, a retail store manager's injury was found compensable when she fell after leaving the store and exiting within the confines of the mall and walking towards the parking structure. (*Haddad v. Bath & Body Works* (May 30, 2014, ADJ8266153) [2014 Cal.Wrk.Comp. P.D. LEXIS 233, *3-6.)[2]

We now turn to the issue of whether applicant's wait for her ride home standing in the employer's parking lot at the end of a shift was a material deviation from applicant's duties. While a substantial or material deviation may take an employee out of the employment relationship, a slight deviation will not take the employee out of employment. (*Rankin v. Workers' Comp. Appeals Bd*. (1971) 17 Cal.App.3d 857, 860 [36 Cal.Comp.Cases 286]; *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd*. (1967) 67 Cal.2d 925, 928 [32 Cal.Comp.Cases 525]; *Western Pipe & Steel Co. v. Industrial Acci. Com*. (*Henderson*) (1942) 49 Cal.App.2d 108.) "Mere deviation by an employee from a strict course of duty does not release the master from liability. In order to have such an effect the deviation must be shown substantially to amount to an entire departure." (*De Mirjian v. Ideal Heating Corp*. (1954) 129 Cal.App.2d 758, 766, citing *Dolinar v. Pedone* (1944) 63 Cal.App.2d 169, 175.) In the absence of an applicable statutory defense, misconduct that is negligent, willful, or even criminal "will bar recovery only when it constitutes a deviation from the scope of employment." (*Westbrooks v. Workers' Comp. Appeals Bd*. (1988)

[2] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

203 Cal.App.3d 249, 253 [53 Cal.Comp.Cases 157] ("*Westbrooks*") emphasis added.) Here, waiting for a ride home was not a deviation, much less a substantial or material deviation.

In a recent Appeals Board panel decision, a meat clerk's injury was found to be compensable when she fell while shopping for personal items after her shift. *(Rico v. Cardenas Mkts.* (May 10, 2021, ADJ12026837) [2021 Cal.Wrk.Comp. P.D. LEXIS 118].) The panel concluded that applicant was injured within a reasonable margin of time following her work shift, and her commute home had not yet begun as she was still on the employer's premises. (*Id*. at p. *2.)

Similarly, here, applicant was waiting on her employer's premises after she finished working that day. Based on the facts before us, we do not discern a practical difference between an employee waiting for a ride while still on the employer's premises and an employee exiting the building to go to their parked car. Therefore, we agree with the WCJ that the going and coming rule is not applicable to the instant case.

Accordingly, we rescind the F&O and substitute a new F&O to find that applicant sustained injury AOE/COE to her head while employed by defendant and that all other issues are deferred.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of December 5, 2022 is **RESCINDED** and the following **SUBSTITUTED** therefore:

FINDINGS OF FACT

1. RICARDA DURAN, also known as, SONIA TINEO TOLEDO, while employed on January 3, 2022 at Santa Fe Springs, California, by PRIORITY WORKFORCE DBA MVP PAYROLL FINANCING LLC, LCF PRIORITY BUSINESS SERVICES INC, whose workers' compensation insurance carrier was UNITED WISCONSIN INSURANCE COMPANY, sustained injury AOE/COE to her head. The issue of injury to other claimed body parts is deferred.

2. All other issues are deferred.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 10, 2023

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

RICARDA DURAN AKA SONIA TINEO TOLEDO
ESPINOZA LAW GROUP
COOPER BROWN

JMR/*pc*

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

STATE OF CALIFORNIA

Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ15799667

RICARDA DURAN AKA SONIA TINEO TOLEDO
vs.
PRIORITY WORKFORCE DBA MVP PAYROLL FINANCING LLC, LCF PRIORITY BUSINESS SERVICES INC.; UNITED WISCONSIN INSURANCE COMPANY;

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: Andrew Malagon

DATE: 1-9-2023

REPORT AND RECOMMENDATION ON DEFENDANT'S PETITION FOR RECONSIDERATION

I
INTRODUCTION

1.	Applicant's Occupation	Deferred
	Applicant's Age	58 Years
	Date of Injury	1/3/2022
	Parts of Body Injured	Deferred
2.	Identity of Petitioner	Defendant filed the Petition.
	Timeliness:	The Petition is timely filed.
	Verification:	The Petition is verified.
3.	Date of Findings of Fact	12/5/2022

4. Petitioner's Contentions:
Defendant contends:
(a) An exception to the general premises liability rule applies as applicant was acting in her own self-interest without benefit to the employer
(b) The going and coming rule is applicable as applicant was going home at the time of the accident

II

FACTS

Applicant was employed for Defendant Priority Workforce DBA MVP Payroll Financing LLC, LCF Priority Business Services Inc. on January 3, 2022 when she was hit by a car while waiting on her employer's premises for her ride home. The matter proceeded to trial on August 17, 2022. The issue before the Court was whether Applicant was entitled to workers' compensation benefits for an injury that occurred on the employer's premises while she was off duty. The matter was continued to September 28, 2022 and again to November 16, 2022 to allow for testimony to be taken.

On December 5, 2022 this Court issued its Findings of Fact in which it was found that the time Applicant spent waiting for her ride to take her home from work before the accident occurred was within the course and scope of her employment. It is from this finding that Defendant seeks reconsideration.

III
DISCUSSION

Defendant's first argument is that an exception to the general premises liability rule applies. Defendant does not dispute that Applicant was injured on their premises while waiting for her ride home after work, however they contend that the act of waiting for a ride home is solely in the applicant's own self-interest with no benefit to the employer. Defendant cites to several cases in support of their argument, however many of these cases involve employees who entered their employers' premises for personal reasons such as picking up a paycheck on their day off (Flagg v. Workers Compensation Appeals Bd. of California, 50 Cal. Comp. Cases 12 (Cal. App. 2d Dist. January 18, 1985)), doing unassigned work for a general contractor who was not their employer (Osbun v. Workers' Comp. Appeals Bd., 93 Cal. App. 3d 163)[3] or returning to the employer's premises five hours after their shift ended to pick up their husband's keys (Campos v. Workers' Comp. Appeals Bd., 79 Cal. Comp. Cases 927 (Cal. App. 2d Dist. June 2, 2014)).

The common thread with the above cited cases is that the employees entered their employers' premises for personal reasons and not in furtherance of their job duties or their employers' interests. This differs from the case-at-hand as Applicant entered her employer's premises to work, and was involved in an

[3] In their Petition for Reconsideration Defendant incorrectly cited to Pacific Telephone & Telegraph Co. v. WCAB 42 CCC 976 (Brenenstuhl) and not Osbun v. Workers' Comp. Appeals Bd., 93 Cal. App. 3d 163 for the proposition that applicant's injury was found non-work-related when he went onto the employer's premises and was injured while doing unassigned work for a general contractor who was not his employer. The facts of Brenenstuhl differ from those stated hy Defendant in their Petition.

accident while waiting for her ride home after her work shift ended. There was no evidence provided to suggest that Applicant left the premises after her work shift ended but before she was hit by the car. In California Casualty Indem. Exchange v. Industrial Acci. Com., 8 Cal. Comp. Cases 55 (Cal. March 19, 1943), the California Supreme Court indicated an employee leaving the premises of her employer in the usual and customary way after her work is ended is within the course of her employment within the meaning of the workmen's compensation law." Applicant's habit was to wait in the outdoor break area for her nephew to take her home after work as she did not have any other way to get home (Minutes of Hearing and Summary of Evidence, 11/28/22 8:30AM session, 3:9-3:10 and 3:22-3:23). This was the Applicant's usual and customary way to get home after her work ended.

In North American Rockwell Corp. v. Workmen's Comp. App. Bd., 9 Cal. App. 3d 154, the California Court of Appeals affirmed that an injury was arising out of and in the course of employment where an employee was injured while helping another employee with their stalled car in their employer's parking lot after their shift ended. The Court indicated "the work day of an employee embraces several intervals when he is not actually performing his assigned duties. These include reasonable periods for rest, lunch, arrival, and departure from the premises. The parking lot cases hold that an employee who has the use of the premises for parking must necessarily have a reasonable margin of time and space in going and coming between his work and his automobile. They do not state what he may do in this time and space. We think that he may do those normal things that men do during any other work-free period, and unless his action is so wholly unreasonable as to support an inference that he abandoned the employment, he remains within the course of employment." In the case-at-hand, Applicant testified that the outdoor break area was used for people to take their lunch or 15-minute break, to wait for someone to give them a ride, or as a waiting area in the morning before clocking in. She had witnessed other people use this area when off the clock and was not aware of a policy against using this area when off the clock, (Minutes of Hearing and Summary of Evidence, 11/28/22 8:30AM session, 3:1 to 3:4). It is within the realm of reasonableness that an employee might wait on an employer's premises for a ride home after their shift ends. Although Applicant was not performing her assigned duties at the time of the accident in the case-at-hand, she was waiting less than 10 minutes in the outdoor employee break area for her ride home after her work shift ended and therefore was within the scope of her employment.

Defendant further argues that the going and coming rule is applicable as Applicant was going home at the time of the accident, however this is a misguided argument as Applicant had not yet begun her commute home. In General Ins. Co. v. Workers' Comp. Appeals Bd., 16 Cal. 3d 595, the California Supreme Court articulated "Prior to entry the going and coming rule ordinarily precludes recovery; after entry, injury is generally presumed compensable as arising in the course of employment. The employer's premises include his

parking lot as well as plant or office, and once the employee has reached the premises, employment is not interrupted by crossing public property while travelling from one part of the premises to another. The "premises line" has the advantage of enabling courts to ascertain the point at which employment begins -- objectively and fairly." Applicant was hit by a car while waiting for her ride home in the employee break area on the employer's premises. As such, the going and coming rule is not applicable to the facts of the case at hand.

IV
RECOMMENDATION

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

DATE: 01-09-2023
Andrew Malagon
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE