WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MIGUEL LUA, ***Applicant***

vs.

LUA'S BUILDING SERVICES, INC.; CALIFORNIA INSURANCE COMPANY, administered by APPLIED RISK SERVICES, ***Defendants***

Adjudication Number: ADJ11438289
Salinas 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.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

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/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 17, 2021

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

MIGUEL LUA
MAURO FIORE JR.
LAW OFFICES OF JOAN SHEPPARD
AETNA

PAG/bea

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Defendant has filed a timely, verified Petition for Reconsideration of the undersigned's Findings of Facts, dated 12/18/20.

II

FACTS

Per the Findings of Fact, Applicant, Miguel Lua, employed as a Journeyman on 4/30/18, at Santa Clara, California, by Lua's Building Services, Inc., then insured by California Insurance Company, sustained injury arising out of and in the course of employment to his head, brain, and right wrist.

Defendant appeals the undersigned's finding that Applicant did not materially deviate from his errand at the time of the motor vehicle accident that caused his injuries. (Finding of Facts, 12/18/20, Finding No. 7.) Defendant also contends that the Applicant's full deposition, rather than just excerpts, should have been admitted into evidence. (Finding of Facts, 12/18/20, Findings No. 9.)

III

DISCUSSION

Applicant's unrebutted, credible testimony established that the reason he was driving late at night on 4/30/18 was to return his employer's boat to Hollister. Applicant was involved in a motor vehicle accident around 9:23 p.m. that night. Applicant testified that he left the McDonald's on San Felipe Road in Hollister shortly before the accident occurred. (JOINT EX. J-1: Traffic Collision Report, Hollister Police Department, 6/8/18, page 1.)

Applicant testified that he has no set time for breaks. His employer has told him that he can stop for food when hungry or even take a nap when tired. (Summary of Evidence, page 6, lines 11-13.) Applicant had not felt hungry until he had reached Hollister. (Summary of Evidence, page 6, line 19.)

The Hollister McDonald's is about seven miles in the opposite direction from his house and Lua's Building Services. (Summary of Evidence, page 6, lines 7-

10.) He chose the San Felipe Road McDonald's, because it is in Hollister where Lua's is. (Summary of Evidence, page 4, lines 14.5-15.5.) He also chose that McDonald's, because that is the one with which he is most familiar and comfortable, when towing the trailer. (Summary of Evidence, page 7, lines 12.5-13.5)

He planned to eat at Lua's shop. He did not eat at the restaurant, because it was late; and, he just w at the 55 MPH speed limit to get from that McDonald's to Lua's yard. (Summary of Evidence, page 4, lines 20.5-23.5)

To be compensable, Labor Code §3600 requires that an injury arise outof and occur in the course of employment. The phrase "course of the employment" relates to the factors of time and place contemplated by the employment. To "arise out of employment," a causal relationship between the injury and employment must be established. (*McIvor v. Savage* (1963) 220 Cal.App.2d 128; 28 Cal.Comp.Cases 247, 250.) The State's Supreme Court has stated in the case of *LaTourette v. W.C.A.B.* that, "When an employee engages in a special activity that is within the course of employment, an injury suffered during the activity or while traveling to and from the place of such activity also arises out of the employment. Thus, we have held that an employee's death as the result of an automobile accident that occurred while he was returning home from educational activities undertaken at the invitation of his employer was compensable. (*Citation.)*" (*LaTourette v. W.C.A.B.* (1998) 17 Cal. 4th 644; 63 Cal. Comp. Cases 253, 257.)

"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 this case, Applicant cannot be said to have made an entire or complete departure from his mission by going to McDonald's on his way back to the employer's location.

Although his reasons for driving *at that particular time* when the accident occurred were in part personal and in part professional, he is not foreclosed from compensation because his reasons were two-fold. "The status of an employee acting

in the course of his employment is not destroyed by the fact that he may be pursuing a dual purpose. If he is carrying out some duty or right in connection with his employment, and combines with it an object of his own, he is still considered to be acting in the course of his employment. As is said in *Lockheed Aircraft Corp.* v. *Industrial Acc. Com.*, 28 Cal.2d 756, 758-759: '. . . where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly or indirectly could he have been serving his employer.' (Citations.)" (*Argonaut Ins. Co. v. I.A.C.* (1963) 221 Cal.App.2d 140, 144.)

Defendant's post-trial objection to the WCJ's marking of Applicant's deposition for identification only is without merit. Applicant depositions are routinely marked for identification only and are used for impeachment purposes. At trial, Defendant did not make a motion to the court to admit the deposition in its entirety. Nor did Defendant object at trial to the WCJ not admitting the deposition into evidence. Defendant had the opportunity to question Applicant and, in fact, used portions of the deposition for impeachment purposes. Those excerpts were admitted into evidence as Defendant's Exhibit D-5.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

ROISILIN RILEY
Workers' Compensation
Administrative Law Judge

Dated and served: January 8, 2021

OPINION ON DECISION

Applicant sustained injury AOE/COE. Applicant did not materially deviate from his work errand at the time of his motor vehicle accident.

Applicant's unrebutted, credible testimony established that the reason he was driving late at night on 4/30/18 was to return his employer's boat to Hollister. Applicant was involved in a motor vehicle accident around 9:23 p.m. that night. Applicant testified that he left the McDonald's on San Felipe Road in Hollister shortly before the accident occurred.

Applicant testified that he has no set time for breaks. His employer has told him that he can stop for food when hungry or even take a nap when tired. Applicant had not felt hungry until he had reached Hollister. The Hollister McDonald's is about 7 miles in the opposite direction from his house and Lua's Building Services. He chose the San Felipe Road McDonald's, because it is in Hollister where Lua's is. He also chose that McDonald's, because that is the one with which he is most familiar, when towing the trailer. He planned to eat at Lua's shop. He did not eat at the restaurant, because it was late; and, he just wanted to finish his duties for the day. He had started work about 10:00 that morning. It takes about 10 to 15 minutes towing the boat at the 55 MPH speed limit to get from that McDonald's to Lua's yard.

To be compensable, Labor Code §3600 requires that an injury arise out of and occur in the course of employment. The phrase "course of the employment" relates to the factors of time and place contemplated by the employment. To "arise out of employment," a causal relationship between the injury and employment must be established. (*McIvor v. Savage* (1963) 220 Cal.App.2d 128; 28 Cal.Comp.Cases 247, 250.) The State's Supreme Court has stated in the case of *LaTourette v. W.C.A.B.* that, "When an employee engages in a special activity that is within the course of employment, an injury suffered during the activity or while traveling to and from the place of such activity also arises out of the employment. Thus, we have held that an employee's death as the result of an automobile accident that occurred while he was returning home from educational activities undertaken at the

invitation of his employer was compensable. (*Citation.)*" (*LaTourette v. W.C.A.B.* (1998) 17 Cal. 4th 644; 63 Cal. Comp. Cases 253, 257.)

Although his reasons for driving *at that particular time* when the accident occurred were in part personal and in part professional, he is not foreclosed from compensation because his reasons were two-fold. "The status of an employee acting in the course of his employment is not destroyed by the fact that he may be pursuing a dual purpose. If he is carrying out some duty or right in connection with his employment, and combines with it an object of his own, he is still considered to be acting in the course of his employment. As is said in *Lockheed Aircraft Corp.* v. *Industrial Acc. Com*., 28 Cal.2d 756, 758-759: '. . . where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly or indirectly could he have been serving his employer.' (Citations.)" (*Argonaut Ins. Co. v. I.A.C.* (1963) 221 Cal.App.2d 140, 144.)

Applicant's Exhibit A-1, Report of Brian Lugo, M.D., is admitted into evidence. The record is relevant to establishing that Applicant injured his head, brain, and right wrist in the MVA.

Ms. Barfield's testimony is not relevant to the reasons he stopped at McDonald's. Ms. Barfield has no direct knowledge of his reasons or motivations for stopping at that McDonald's. Also, that she would have noted his food from McDonald's in the police report does not disprove Applicant's testimony that he had indeed bought food. Defendant has not rebutted his credible testimony regarding his reasons for stopping at that McDonald's at that particular time.

Defendant's post-trial objection to the WCJ's marking of Applicant's deposition for identification only is without merit. Applicant depositions are routinely marked for identification only and are used for impeachment purposes. At trial, Defendant did not make a motion to the court to admit the deposition in its entirety. Nor did Defendant object at trial to the WCJ not admitting the deposition into evidence. Defendant had the opportunity to question Applicant and, in fact,

used portions of the deposition for impeachment purposes. Those excerpts were admitted into evidence as Defendant's Exhibit D-5.

Respectfully submitted,

ROISILIN RILEY
Workers' Compensation
Administrative Law Judge

Dated and served: December 18, 2020