WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KANG LEE, Applicant

vs.

CALIFORIA DEPARTMENT OF CORRECTIONS AND REHABILITATION-CALIFORNIA INSTITUTION FOR WOMEN; STATE COMPENSATION INSURANCE FUND, Defendants
Adjudication Number: ADJ13239935

Long Beach District 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.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and Opinion on Decision 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 and Opinion on Decision, both of which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration.

Labor Code 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." The "going and coming" rule excludes from compensability injuries that occur while the employee is going to or returning from work in the routine commute. (*Ocean Acc. & Guarantee Co. v. Industrial Acc. Com. (Slattery)* (1916) 173 Cal. 313.) "The rule provides that an injury suffered 'during a local commute en route to a fixed place of business at fixed hours in the absence of special or extraordinary circumstances is not within the course of employment.'" (*Price v. Workers' Comp. Appeals Bd. (Price)* (1984) 37 Cal.3d 559, 564–565 [49 Cal.Comp.Cases 772] quoting *Hinojosa v. Workmen's Comp. Appeals Bd*. (1972) 8 Cal.3d 150, 157 [37 Cal.Comp.Cases 734].) The rationale for this judicially created doctrine is that during an ordinary commute, the

employee is not rendering any service for the benefit of the employer. (*City of San Diego v. Workers' Comp. Appeals Bd. (Molnar)* (2001) 89 Cal.App.4th 1385 [66 Cal.Comp.Cases 692].)

However, numerous exceptions to the going and coming rule exist. (*Hinojosa, supra*, at p. 156.) "Since the going and coming rule rests upon the basis that the employer-employee relationship lapses during the employee's off-duty absence from the job, [] the rule does not apply in the event that the relationship in fact continues. . . . courts have recognized exceptions to the rule upon a showing that the employer furnished transportation to the worker or compensated him for travel time or defrayed his travel expenses." (*Zenith National Ins. Co. v. Workmen's Comp. App. Bd*. (1967) 66 Cal.2d 944, 947 [32 Cal.Comp.Cases 236]; see also *Kobe v. Industrial Acci. Com*. (1950) 35 Cal. 2d 33, 35 (15 Cal.Comp.Cases 85, 87)[the employer may agree, either expressly or impliedly, that the relationship shall continue during the period of "going and coming," in which case the employee is entitled to the protection of the act during that period. … such an agreement may … be inferred from the fact that the employer compensates the employee for the time consumed in traveling to and from work").) Here, for the reasons outlined by the WCJ in the Report and Opinion on Decision, we that the "going and coming" rule does not bar recovery.

Moreover, 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 as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 5, 2022, Findings of Fact is **AFFIRMED**,

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 29, 2022

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

KANG LEE
PERONA, LANGER, BECK, SERBIN & HARRISON
STATE COMPENSATION INSURANCE FUND, LEGAL

PAG/mc

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 OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

1. Applicant's Occupation:	Physician
Applicant's Age:	44 at DOI
Date of Injury:	June 10, 2019
Parts of Body Inured:	Head, with others claimed
2. Identity of Petitioner:	Defendant
Timeliness:	Yes
Verification:	Yes
3. Date of Findings:	January 5, 2022
4. Petitioner's Contentions:	The Applicant's claim is barred by the "Going and Coming Rule"

II

STATEMENT OF THE CASE AND FACTS

The Applicant was working an "on call" shift over the weekend. For the Applicant's job classification, being "on call" means being available by telephone to handle any issues that arise at the worksite that could be addressed telephonically. The Applicant also has the discretion to return to the worksite and address any issues in person. If the Applicant is required to return to the worksite, he is compensated for that travel time.[1]

The on call shift lasted until Monday morning, at 8:00 a.m. The Applicant was on his way to the physical worksite on Monday morning, earlier than usual to finish up work from the on call shift, June 10, 2019, when he rear ended another motorist.[2] The Applicant was injured in this accident and sustained injury to his head, with other complaints noted in medical reporting.[3] He then subsequently filed a workers' compensation claim.

[1] Applicant's Exhibit 8, Page 23
[2] Applicant's Exhibit 7
[3] Applicant's Exhibits 1 – 6

The issue at hand is whether the Applicant's injury during travel to the worksite is barred by the "Going and Coming Rule." After trial, where the Applicant and an employer witness both testified, the undersigned issued a Findings of Fact that the Applicant's claim is not barred by the "Going and Coming Rule." Defendant files a timely and verified Petition for Reconsideration challenging this finding.

III

DISCUSSION

Compensation for travel time

The Petition for Reconsideration takes various issues with the analysis regarding travel time and compensation therefrom. The undersigned notes that the Petition states that the Applicant does not have the discretion to return to the worksite; however, this is not accurate. The Collective Bargaining Agreement, in Section 7.9, A, 1, indicates states that an on-call assignment, in part, is defined by being "normally immediately available to return to the facility for any required medical support deemed necessary by the employee."[4] The Petition discusses a different subsection below on the same page, but ignores the key language of "deemed necessary by the employee." The undersigned interprets the plain reading of the bargaining agreement to delegate judgment to the employee to determine what medical support would be necessary to return to the job site. The undersigned further concludes that this means being reasonably prepared and understanding of a patient's needs so that other individuals providing medical care to that same patient are on the same page.

Additionally, the undersigned did find Dr. Taylor to be a credible witness, but also found that the Applicant was credible as well. Dr. Taylor's testimony regarding reimbursement for travel time was helpful, but it was limited to hypothetical situations and contingencies. It is undisputed that the Applicant had not submitted a request for reimbursement for the commute during which he was injured.

Dr. Taylor's testimony about the reimbursement is limited to what she would have done had there been a request in front of her for reimbursement for that travel time. The Applicant presented evidence, through his unrebutted testimony, that he had made at least one prior similar request at the Tehachapi location, which was granted. He indicated he had yet to make such a

[4] Applicant's Exhibit 8, Page 23

request at the current location, where the injury happened, because the situation had not yet arisen. Moreover, the Applicant indicated he would have made the request, but for having been in the car accident. With respect to the discrepancy between what Dr. Taylor "would have done" if the Applicant "had" requested reimbursement, the undersigned looks to the unrebutted testimony from the Applicant's prior experience as the only evidence of how such a request is handled. The testimony from Dr. Taylor and the Applicant that deals with hypotheticals essentially cancels each other out, but the testimony regarding a prior reimbursement from Tehachapi was unrebutted and persuasive. This testimony lends credibility to the fact that an early return to the job site to finish up work from an on call period would be compensable and therefore defeat the "Going and Coming Rule."

Notwithstanding the foregoing, the Applicant was "on call" for the duration of the weekend and received compensation for that extra time and the work performed therefrom. The Collective Bargaining Agreement acknowledges from additional compensation available for travel into the job site as well.

There is no break in this instance from the Applicant being "on call" to the start of his normal shift, therefore there is no break in the employment relationship.[5]

Therefore, since the injury happened during the on call period, the undersigned finds enough evidence at hand to demonstrate that the on call period was compensated and the travel time was potentially compensable to apply the exception to the "Going and Coming Rule."

Special Mission

Defendant argues that the "Going and Coming Rule" should apply and even the "Special Mission Exception" should not prevent applying the rule. In support of the argument, Defendant cites to cases that barred benefits for employees working overtime or a "holdover" shift who sustained injuries during their travel.[6] The analysis for this exception is generally subject to a three factored test. The test evaluates: (1) the location of the shift, (2) the difference between the usual work schedule and the shift at which the travel was done, and (3) the activity being extraordinary in relation to routine duties.[7]

[5] California Casualty Indem. Exchange v. Industrial Acci. Com., 21 Cal. 2d 751, 753
[6] *See* Lantz v. Workers' Comp. Appeals Bd., 226 Cal. App. 4th 298; *see also* Watkins v. Centinela Freeman Holdings, 2015 Cal. Wrk. Comp. P.D. LEXIS 373
[7] Lantz, 226 Cal. App. 4th 298, 317-320

In analyzing the first factor, the location, it is uncontroverted that the Applicant was returning to the job site to perform the "additional" work of reviewing the charts and preparing for the meeting. This fact weighs against the work being deemed extraordinary, but is far from conclusive. In analyzing the difference between the usual schedule and the time of the extra work, the undersigned again notes that the Applicant was "on call" for the duration of the weekend all the way until his normal shift was slated to start. The Applicant had a subjective need to arrive early and be prepared for a meeting to go over the events of his on call shift. Dr. Taylor's credible testimony establishes an objective analysis that the meeting itself was important, as she indicated it was expected that the presenting individual be prepared. It is generally well-established that the special mission exception is inapplicable when the only special component is the work shift beginning earlier or ending later.[8] That is not the case here, as the Applicant's on call shift, which was the duration of the entire weekend, created a subjective and objective need to continue the work by reviewing charts/notes and being prepared for the meeting. Essentially, there is more here than just the Applicant leaving for work earlier than usual. This factor weights in favor of applying the exception to the rule.

The third factor turns on an inquiry of the activity being extraordinary in relation to routine duties. The Applicant was returning to the job site not to start his normal work shift, but to finish up work and issues that had arisen over the on call shift prior to his regular shift starting. The on call work created an extraordinary situation, which would cause the Applicant to have additional work that he would not otherwise have during a regular shift. Additionally, the work performed during his on call period essentially made him the physician on duty for the correctional facility. This is a dramatic departure from daily duties and obligations, where other team members and professionals are available.

The on call work of tending to phone calls and emergency patient needs increased his workflow and made him the sole individual responsible for the facility. The on call work and the need to be prepared for a meeting with other staff on Monday morning is not a "routine" duty as it arose out of the increased work from the on call period, which was also unique to the individual being on call. There is nothing in evidence demonstrating that any other individual over this particular weekend was similarly burdened, i.e., having to prepare and review charts or provide a

[8] General Ins. Co. v. Workers' Comp. Appeals Bd., 16 Cal.3d 595, 601

presentation to the team. The undersigned finds that this factor tends towards applying the exception because the nature of the work involved was different.

On balance, the undersigned interprets the evidence at hand to demonstrate that something about the nature of the work and the hour of the work in light of the on call period is enough of a deviation from the customary, fixed, or usual norm and that the case should not be barred by the "Going and Coming Rule."[9]

Liberal construction and principles of interpretation

The California Supreme Court has indicated "[e]ach case must be adjudged by the facts which are peculiarly its own."[10] The California Supreme Court has also stated that the "liberal construction" guidance of Labor Code §3202 applies in evaluating this judicially created rule.[11] It is with that in mind that the undersigned is not convinced that the harshness of the "Going and Coming Rule" should bar benefits herein. Essentially, the Applicant was "on call" for the entire weekend, leading up to his regularly scheduled shift. The on call duties, which were different than regular work duties, created a subjective need in the Applicant's mind, backed up by objective testimony from Dr. Taylor, to return early to the job site to be prepared for the presentation, because it is an important employment event.

The undersigned also notes that the Applicant's employment relationship was not suspended at any time during the "on call" shift through the start of his regular shift and the car accident occurred during that period. The Applicant's availability, coupled with the additional work performed, conferred a benefit to the employer. In essence, Applicant's travel to the worksite was not his "normal commute" and there were more differences in this particular travel than just leaving at an earlier time; the totality of circumstances must be considered. The "Going and Coming Rule" is intended to bar injuries that happen during a normal commute, but the "peculiar facts" herein demonstrate that this was not a "normal commute."

[9] Baroid v. Workers' Comp. Appeals Bd., 121 Cal. App. 3d 558, 569
[10] Makins v. Industrial Acci. Com., 198 Cal. 698, 703
[11] Price v. Workers' Comp. Appeals Bd., 37 Cal. 3d 559, 565

Therefore, it is with that analysis in mind, that undersigned not able disregard any exception and apply the "Going and Coming Rule" to deny benefits, which would be a harsh result on the "peculiar facts" of this case.

IV
CONCLUSION

The undersigned respectfully recommends that the Petition for Reconsideration, dated January 21, 2022, be denied for the reasons stated in the original Opinion on Decision and further elaborated upon herein.

DATE: 1/31/2022

Michael Joy
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

Going and Coming Rule

It is well established that injuries occurring during an employee's commute to and from work are not compensable due to the "Going and Coming Rule."[12] One exception, among many, exists where the employer pays the wages of an employee during the commute. [13]Furthermore, when evaluating the "Going and Coming Rule," the California Supreme Court has indicated "[e]ach case must be adjudged by the facts which are peculiarly its own."[14] The California Supreme Court has [] also stated that the "liberal construction" guidance of Labor Code §3202 applies in evaluating cases involving the rule.[15]

The facts at hand are straightforward and undisputed. The Applicant was working an "on call" shift over the weekend. For the Applicant's job classification, being "on call" means being available by telephone to handle any issues that arise at the worksite that could be addressed telephonically. The Applicant also has the discretion to return to the worksite and address any issues in person. If the Applicant is required to return to the worksite, he is compensated for that travel time. (Applicant's Exhibit 8, Page 23). The shift lasted until Monday morning, at 8:00 a.m. The Applicant was on his way to the physical worksite on Monday morning, June 10, 2019, when he rear ended another motorist. (Applicant's Exhibit 7). The Applicant was injured in this accident and sustained injury to his head, with other complaints noted in medical reporting. (Applicant's Exhibits 1 – 6). He then subsequently filed a workers' compensation claim. The issue at hand is whether the Applicant's injury during travel to the worksite is barred by the "Going and Coming Rule."

The Applicant was on call for the entirety of the weekend until 8:00 a.m., Monday morning. The Applicant's normal workday would then start at 8:00 a.m. on that same Monday, the date of injury. The undersigned found that the Applicant was credible and seemed to be testifying to the best of his ability.[16] The Applicant's credible testimony was that he had a significant number of phone calls during his "on call" period and needed to return to the job site to review the patient charts so that he could inform staff of any pressing concerns and the events of the weekend. Dr. Leslie Taylor's testimony, which was also credible, reiterated an importance of this process and even elaborated that this

[12] *See* Ocean Acci. & Guarantee Co. v. Industrial Acci. Com., 173 Cal. 313.
[13] *See* Kobe v. Industrial Acci. Com., 35 Cal. 2d 33.
[14] Makins v. Industrial Acci. Com., 198 Cal. 698, 703
[15] Price v. Workers' Comp. Appeals Bd., 37 Cal. 3d 559, 565
[16] *See* Garza v. Workers' Comp. Appeals Bd., 3 Cal. 3d 312.

discussion takes place during a presentation. (MOH & SOE, 12/27/21, Page 3, Lines 7-12). She testified that an expectation was that the presenting employee be prepared. (Id.).

Essentially, the undersigned interprets this as the work of the "on call" weekend created a subjective need in the Applicant's mind to arrive at the physical job site early and to review the events of the weekend. This is further objectively backed up by Dr. Taylor's testimony of the meeting's importance. The undersigned notes that the police report in evidence indicates the CHP officer arrived at 6:42 a.m. and that the Applicant testified to leaving his house earlier than he would for a usual commute, establishing that the Applicant's travel was not his normal commute. (MOH & SOE, 9/21/21, Pages 4-5, Line 25, 1-4 & Applicant's Exhibit 7).

Moreover, the undersigned notes that the Applicant was "on call," without a break, until the start of his normal workday on Monday. He was therefore conferring a benefit to the employer by being on call and was on call during the travel. Dr. Taylor's testimony was that the Applicant needed to be available to return to the work site if the need arose during an "on call" period; this testimony is backed up by the Union Agreement. (Applicant's Exhibit 8, Page 23). The Applicant is also paid for his time during his "on call" period. (Id.) This alone restricts Applicant's freedom to be out and doing other non-work related things, since he would have to be physically available to arrive at the worksite if needed. The California Supreme Court has explained the reasoning for the "Going and Coming Rule" is "since the employee, during the time he is going to or coming from work, is rendering no service for his employer."[17] The relationship of this employer and the Applicant was not suspended during this travel as the Applicant was still on call while he was in his vehicle. The Applicant herein was rendering service for his employer, and his claim for injury should not be barred by the rule. He was available all weekend, available by being "on call" when the accident itself occurred, and per his own testimony arriving early to review charts from the weekend and be prepared for the meeting.

Applicant also stated he would have requested travel time compensation, except he did not because he had been in the accident and did not make it in to the worksite. (MOH & SOE, 9/21/21, Page 8, Line 11). The Applicant also stated that he had previously worked at the Tehachapi location and had in fact received travel time compensation for going in early after an "on call" weekend to prepare reports; however, this had not yet occurred at his current location because the situation had not yet arisen. (MOH & SOE, 9/21/21, Page 7, Lines 22-24). Moreover, the Union Bargaining agreement

[17] California Casualty Indem. Exchange v. Industrial Acci. Com., 21 Cal. 2d 751, 753

expressly allows for employee discretion in returning to the job site. (Applicant's Exhibit 8, Page 23). The agreement states that an employee must be available to return for "any required medical support deemed necessary by the employee." (Id.).

On the other hand, Dr. Leslie Taylor also provided credible testimony. She indicated that she would likely have not approved a travel compensation request for the Applicant based on these facts and circumstances. (MOH & SOE, 12/27/21, Page 3, Lines 18-22). She went on to indicate that she saw nothing in front of her that would lead her to believe that the travel time would be compensable. (Id.). Essentially, the review of patient charts was not contemplated by the agreement. Additionally, the Applicant was not paid travel time compensation for the travel that resulted in his injury. The undersigned does not find that persuasive, however, because the Applicant credibly testified that he had received similar compensation at a prior work location for the same reason and that he had never put in such a request at his current work site, where he was employed when the injury occurred.

On balance, the undersigned finds this to be a compensable claim and enough medical reporting is in evidence to support a finding of injury to Applicant's head. The record needs development to determine what additional body parts were injured, if any. The totality of the circumstances herein trends toward extending workers' compensation benefits, especially when the undersigned reviews the evidence in light of the foregoing authority mandating that each case be judged on its unique facts with a preference for extending benefits under "liberal construction." Given that the Applicant was "on call" when the injury occurred, the work performed at home during the "on call" period created a need for the Applicant to return to the physical site early, considering additional potential compensation for travel time, and the overall benefit to the employer given by the Applicant during this "on call" period, the balancing of equities mandates a finding of compensability.

DATE: January 5, 2022

Michael Joy

WORKERS' COMPENSATION

ADMINISTRATIVE LAW JUDGE