WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MIGUEL CONTRERAS, ***Applicant***

vs.

SHIFT TECHNOLOGIES, INC., LIBERTY MUTUAL INSURANCE COMPANY,
Defendants

Adjudication Number: ADJ14628369
San Francisco District Office

OPINION AND DECISION GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact and Award (F&A) issued on February 4, 2022, wherein the workers' compensation administrative law judge (WCJ) found as relevant that on April 20, 2021 applicant sustained injuries to various body parts arising out of and in the course of his employment (AOE/COE) as a "Driving Logistics Associate/Driver" with defendant.

Defendant contends that the WCJ erred by applying the personal comfort doctrine to the circumstances surrounding applicant's injury and engaged in misconduct by coaching applicant's trial testimony.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

Defendant filed a request for leave to file a supplemental pleading with an accompanying supplemental pleading and attachment filed pursuant to WCAB Rule 10974 on March 29, 2022. We approve the request, and accept defendant's Supplemental Petition. (Cal. Code Regs., tit. 8, § 10964.)

We have considered the allegations of the Petition, the Answer, the Supplemental Petition and the contents of the Report, of which we adopt and incorporate parts III, IV and V, except that

we will not adopt and incorporate the last fourteen words of part IV. Based on our review of the record, and for the reasons stated below, we will grant reconsideration, and as our Decision After Reconsideration, we will affirm the F&A, except that we will amend to find that applicant sustained injury to his right hand, defer the issue of whether applicant sustained injury to additional body parts, and defer the issue of whether defendant's attorney is subject to sanctions pursuant to Labor Code section 5813[1] and WCAB Rule1042, and we will return this matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On January 10, 2022, we admonished defendant's attorney, Littler Mendelson, that "[f]ailure to comply with the WCAB's rules in the future may result in the imposition of sanctions." (Opinion and Order Dismissing Petition for Reconsideration and Denying Petition for Removal, January 10, 2022, p. 2.)

On January 27, 2022, the matter proceeded to trial of the following issues:

1. Did the injuries of applicant arise out of and in the course of his employment?
. . .
2. Defendant raises all affirmative defenses including, but not limited to, the going and coming rule. And then applicant raises all issues related to AOE/COE including, but not limited to, special risk exception and the personal comfort doctrine.

(Transcript of Proceedings, January 27, 2022, pp. 9:12-10:22.)

The parties stipulated as follows:

> [Applicant] . . . claims to have sustained injury arising out of and in the course of employment to his right hand, left hip and lower extremity, and psyche.
>
> Applicant was an hourly employee. His hourly rate at the time of the injury was $16.00.
>
> At the time of the injury on 4/20/2021, Obed Orellana's . . . work shift was scheduled to begin at 8:00 a.m. and was scheduled to end at 4:00 p.m.
> . . .
> Applicant's job duties include: move cars to and from garages, dealerships, car washes, and to drive the concierge team to and from various locations.
> . . .
> Applicant, 23 years old, sustained injuries as a result of a head-on automobile collision in which he was the passenger. He was riding in a personal car -- he was riding in Obed Orellana's personal vehicle with Obed Orellana driving in his

[1] Unless otherwise stated, all further statutory inferences are to the Labor Code.

personal car, when they were involved in a head-on collision. Applicant was rushed by ambulance to San Francisco General Hospital.
. . .
11:45 a.m. (Approximately) . . . Applicant arrived for work at Shift location in South San Francisco. He could not find street parking, so he parked in the customer lot at the Shift location. There was an onboarding issue and applicant was not properly integrated into the time management system (ADP). As a result, applicant maintained his own time and turned it in manually to his manager. Applicant kept a record of his time on his phone. . . . .

12:10 p.m. (Approximately) . . . Applicant's first task at work. He is asked by supervisor (David Zeng, Z-e-n-g) to retrieve a Tesla from the East lot and bring it to the West lot for a customer to test drive. . . .

12:15 p.m. (Approximately) . . . Applicant returns to the customer lot with the Tesla. When applicant returns, his car is still parked in the customer lot and he remembers that he needs to move it. Coworker, Obed Orellana, is standing nearby. Applicant states that he needs to move his car and Obed overhears and offers to give him his parking spot. Applicant gets into his own car to move it out of the customer lot and drives over to where Obed is parked. Applicant takes Obed's street parking spot and then hops in Obed's car.

12:22 p.m. Time of collision - according to police report.
(*Id.*, pp. 5:16-7:21.)

The WCJ admitted exhibits entitled Deposition Transcript of Applicant, July 21, 2021; San Francisco General Hospital ER Records dated April 20, 2021; Excerpts of Subpoenaed Records from Kaiser Permanente Medical Center; and Workweek Schedule for April 20, 2021. (*Id*., pp. 11:9-12:25.)

In his deposition testimony, applicant testified as follows:

Q. Then what happened?

A. After I parked my car in his spot, I hopped into his car, and we were going to go look for parking, and as we were driving down the street -- I was on my phone. He was driving, and there was a -- I would look up and look back down. I remember some stuff what I saw the box truck and as we were driving to drive by -- there was a car that went around the box truck. Obed tried to stop as fast as he can before passing, but he couldn't and we crashed into the other driver that was there at the scene.
(Ex. G, Deposition Transcript of Applicant, July 21, 2021, p. 13:8-17.)

Applicant's physicians at San Francisco General Hospital diagnosed him on the date of the accident as follows:

> Displaced fracture of posterior wall of left acetabulum, initial encounter for closed fracture
> Displaced fracture of base of fifth metacarpal bone, right hand, initial encounter for closed fracture
> Anxiety disorder, unspecified
> Major depressive disorder, single episode, unspecified
> (Ex. 1, San Francisco General Hospital Records, April 20, 2021, p. 3.)

Applicant's physicians at Kaiser Permanente diagnosed him as follows:

> Patient sustained a L acetabular fracture, right hand fourth and fifth metacarpal fractures.
> (Ex. F, Excerpts of Subpoenaed Records from Kaiser Permanente Medical Center, p. 11.)

The Workweek Schedule for April 20, 2021 shows that applicant's co-worker, Obed Obellana, was scheduled to work from 8:00 a.m. until 4:00 p.m. on the April 20, 2021. (Ex. E, Workweek Schedule for April 20, 2021.) It further shows that applicant was scheduled to work from 2:00 p.m. until 10:00 p.m. on that date. (*Id.*)

At trial, applicant testified as follows:

> Q. Okay. So what is your understanding of this lot? What lot is this?
>
> A. That's the West lot.
>
> Q. Okay. And what does Shift use the West lot for?
>
> A. We use that as like a showroom for customers to go around and look at cars.
> (Transcript of Proceedings, January 27, 2022, pp.17:22-18:2.)
>
> Q. What were you doing in Obed's car?
>
> A. I was accompanying him trying to go look for parking.
>
> (Reporter interruption and clarification.)
>
> A. He gave me a solid by giving me his parking spot.
>
> Q. You were saying he gave you a solid by giving you his parking spot. Keep going.

A. That was on the street.

Q. Okay. And between the time when you got in Obed's car and the time when the accident occurred, how much time approximately elapsed?

A. Probably like less than two minutes.
(*Id*., p. 24:15-24.)

MR. MUNOZ: Yes. Thank you.
Q. Now, Mr. Contreras, you said on the date of the accident you were in the West lot; is that correct? That's where you parked your car?

A. Yes.

Q. And you parked your car there because you couldn't locate any other parking when you came into work that day; is that correct?

A. Yes.
(*Id*., p. 31:4-12.)

Q. Okay. So, Mr. Contreras, if you were going to go back to work, why didn't you just walk back to work?

A. Like I said, he gave me a solid by giving me his parking spot. So I thought I was just accompanying him to go look for parking so he didn't have to walk back alone.
Q. So this was a personal favor that you were doing for Obed; is that correct?
. . .
"Question: So you did a personal thing. It wasn't a job-related thing; isn't that correct?")
THE WITNESS: Yes.
(*Id.*, pp. 40:18-41:24.)

Q. So you actually were not helping Obed look for a parking spot; isn't that correct?

A. It's not that I was helping him -- not that I was not helping him. Like I said previously, he would have stopped if he found a parking spot. And when I got in, I didn't reach for my phone right away.
(*Id*., p. 47:8-13.)

MR. SULLIVAN: Q. Miguel, you also mentioned that part of the reason that you got into Obed's car was to accompany him back to work in case he had to walk from far away; is that correct?

A. Yes.

Q. In your experience, was it typical at that time for employees to have to park rather far away and walk back to work?

A. Yes.

Q. And the only reason that you moved your car in the first place and thereafter got in Obed's car was because you were not allowed to park in that customer lot, correct?

A. Yes.
(*Id*., pp. 47:21-48:8.)

Q. You moved your car from the lot and you parked it on the street; is that correct?

A. Yes.

Q. So you had fulfilled your obligation to move the car from the parking lot; is that correct?

A. Yes, to create space for customers and test drive vehicles.

Q. So at that point you had a parking space. How come you didn't go back to work?

A. Like I said before, I was accompanying Obed so he won't walk back by himself.
(*Id*., pp. 48:18-49:6.)

Defendant's Regional Operations Manager on April 20, 2021, Samuel Campbell, testified as follows. (*Id.*, pp. 51:23-52:12.)

Q. And I'm asking you in the past tense, so back at the time of the accident, would you drive to work back then as well?

A. Yes, I would.

Q. Okay. And during that time, did you ever have to park on the street?

A. Yes.

Q. So it was not uncommon for employees to have to park on the street in this location?

No, it's more convenience.

(*Id.*, p. 57:15-24.)

On March 29, 2022, defendant filed a request for leave to file a supplemental pleading with an accompanying attachment, the report of panel qualified medical evaluator (PQME) Dr. George

Rakkar, M.D., dated March 7, 2022. (Request to File Supplemental Petitions with Attachments, March 29, 2022.) The report states, in pertinent part:

> DIAGNOSIS:
>
> Right wrist pain, persisting after fracture
> Left knee pain - possible internal derangement
>
> DISCUSSION:
>
> Mr. Contreras suffered trauma at work while performing normal work duties. His pain started after being involved in a head-on motor vehicle collision. As a result of this head-on collision, he is suffering from residual pain and functional deficits in his right hand and wrist, and left knee.
>
> Mr. Contreras has not reached maximum medical improvement, and should not yet be considered permanent and stationary.
>
> CAUSATION:
>
> Causation for right hand and left knee is given to a work-related specific trauma dated *doi.
> (*Id.*, Exhibit A, Report of Dr. Rakkar, March 7, 2022, pp. 17-18.)

DISCUSSION

We observe that California has a no-fault workers' compensation system. With 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.'" (§§ 3351, 5705(a); *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354 [54 Cal.Comp.Cases 80].)

An "employee" is defined as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." (§ 3351.) Any person rendering service for another, other than as an independent contractor or other excluded classification, is presumed to be an employee. (See § 3357.) Once the person rendering service establishes a prima facie case of "employee" status, the burden shifts to the hirer to affirmatively prove that the worker is an independent contractor.

(*Cristler v. Express Messenger Sys. Inc*. (2009) 171 Cal.App.4th 72, 84 [74 Cal.Comp.Cases 167] (*Cristler*); *Narayan v. EGL, Inc*. (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724] (*Narayan*).) Consequently, all workers are presumed to be employees unless the hirer can demonstrate that the worker meets specific criteria to be considered an independent contractor.

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." 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." (§ 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 [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 v. Workers' Comp. Appeals Bd.*, *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. Ind. 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. I.A.C.* (*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 [48 Cal.Comp.Cases 326, 329].)

Here, defendant contends that no "credible evidence" shows that applicant's conduct "in getting into a co-worker's vehicle during his shift (not on a break), whether to swap parking spaces or not," was contemplated by his employment because it was not "a condition or incident" of employment and therefore not subject to the personal comfort doctrine. (Petition, p. 14:13-17.)

We note preliminarily that this argument conflates the elements of AOE/COE under section 3600, essentially arguing that applicant failed to prove the elements COE because he failed to prove AOE. Notwithstanding the framing of defendant's argument, however, the Petition and Supplemental Petition otherwise argue that the evidence surrounding applicant's conduct fails to demonstrate grounds for the application of the personal comfort doctrine and therefore fails to show that his injury occurred within the course of employment.[2]

In *Price v. Workers' Comp. Appeals Bd*. (1984) 37 Cal. 3d 559, 567–568 [49 Cal. Comp. Cases 772], the Supreme Court defined the personal comfort doctrine as follows:

> Such acts as are 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.] This court has noted that the personal convenience exception 'is not limited to acts performed on the employer's premises.' [Citation.]
>
> Acts of 'personal convenience' are within the course of employment if they are 'reasonably contemplated by the employment [Citations]. Courts consider the nature of the act and the nature of the employment, the custom or usage of the employment, the terms of the employment contract, and 'other factors.' [Citations.] In view of the policy favoring employee compensation, doubts as to whether an act is reasonably contemplated by the employment are resolved in favor of the employee. [Citations.]
> (*Price*, *supra*, 37 Cal. 3d at 567–568.)

Thus, even where an employee is 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. This principle holds especially true in cases where the applicant is being paid during the time involved. (*Brooks*, *supra*; see also *Rankin v. Workmen's Comp. Appeals Bd.* (1971) 17 Cal.App.3d 857.)

For example, in *Price*, the Supreme Court held that the circumstances in which an employee awaiting the commencement of the workday was struck by a car while pouring oil into his own car, which was parked outside of the employer's premises because the employer did not provide parking, were sufficient to show that the employee's injury occurred during an act of

[2] We note that there appears to be no actual dispute before us as to whether applicant sustained injury arising out of employment. The facts demonstrate a causal link between applicant's employment and his injury in that the injury occurred as a consequence of a series of acts incidental to his employment.

personal convenience reasonably contemplated by his employment, and, therefore, in the course of employment. (*Price, supra*, 37 Cal. 3d at 563.)

In the present case, the parties stipulated that applicant could not find street parking when he arrived at work, so he parked in defendant's customer lot, identified as the "West lot" in applicant's testimony. (Transcript of Proceedings, January 27, 2022, pp. 5:16-7:21, 17:22-18:2, 31:4-12.) Applicant's initial task that day was to deliver one of defendant's vehicles to the West lot; and, when he completed this task, he remembered that he needed to remove his own car from that lot. (*Id*., pp. 5:16-7:21.) A co-worker offered up his own parking spot; and, after parking in the spot previously occupied by the co-workers' car, applicant got into the co-worker's car as a passenger and sustained injuries in a motor vehicle collision two minutes later. (*Id*., pp. 5:16-7:21, 24:15-24.)

In addition, the record shows that applicant's employment involved driving defendant's vehicles to and from "garages, dealerships, car washes, and . . . various locations" and, more particularly, to and from parking lots so that they could be viewed by potential customers. (*Id*., pp. 6:9-13, 48:18-49:6.) Moreover, the record suggests that he was being paid for his time while he performed the personal task of parking his own car away from defendant's lot. (*Id*., pp. 5:16-7:21.)

In this context, we do not view applicant's driving his own car away from the West lot to a parking spot made available by a co-worker and accompanying the co-worker's search for a parking spot as conduct removed from the essential nature of his employment. (See, e.g., *Price, supra,* at p. 568 (stating that performing "a minor personal task . . . is a 'normal human response[]' . . . [and] within the reasonable contemplation of the employment contract.").) Rather, we view applicant's conduct as consistent not only with the tasks of his employment, but also with defendant's intended use of the West lot in that it ensured that the lot was available to defendant to present its vehicles to potential customers.

As such, we conclude that applicant met his burden of proving that his conduct was reasonably contemplated by his employment and, therefore, that this injury occurred within the course of employment.

Having determined that the evidence is sufficient to prove applicant's injury occurred in the course of employment, we turn to defendant's contentions that this evidence is not credible. Here defendant argues that the WCJ erroneously (1) relied on applicant's and his co-worker's

schedules to conclude that it would be dark when applicant's shift ended; and, therefore, that it was logical for applicant to accept a parking space for his own car close to his workplace; and (2) concluded that applicant's testimony was credible by ignoring applicant's alleged testimony that he was "helping" his co-worker find a parking spot when the accident occurred. (Petition, pp. 11:2, 12:17.)

As to the first argument, we are unable to discern how the WCJ erred in concluding that it would be dark at 10:00 p.m., the time applicant's shift was scheduled to end; and, therefore, that applicant would have had a logical basis to accept a parking spot a short distance from his workplace.[3]

Here, the documentary evidence as well as the parties' stipulations show that applicant was scheduled to work until 10:00 p.m. on the date of the accident and his co-worker, Mr. Orellana, was scheduled to work until 4:00 p.m. (*Id*., pp. 5:16-7:21; Ex. E, Workweek Schedule for April 20, 2021.)

Additionally, we are unaware of any legal authority, and defendant cites none, prohibiting the WCJ from considering objective evidence in evaluating the issue of whether applicant's act of personal convenience was reasonably contemplated by his employment and restricting the determination of that issue to evidence of applicant's subjective considerations.[4]

Given the absence of such authority, we observe that the objective evidence before us suggests that it was reasonable for applicant to accept the parking spot—for reasons of safety or, as defendant's witness Mr. Campbell testified, convenience—given that parking in the area was difficult to find and applicant needed to move his car from the West lot. (Transcript of Proceedings, January 27, 2022, pp.17:22-18:2, 47:21-48:8, 57:15-24.)

As to the second argument, defendant misinterprets applicant's testimony. Applicant testified in deposition that "we were going to look for parking, and as we were driving down the street—I was on my phone . . . I would look up and look back down." (Ex. G, Deposition

[3] We note that defendant's Supplemental Petition admits that "it would have likely been dark outside when Applicant got off work, 10:00 p.m." (Supplemental Petition, p. 6:19.)

[4] Although defendant fails to cite legal authority for the proposition that the WCJ was precluded from considering objective evidence to evaluate the issue of whether applicant's act of personal convenience was reasonably contemplated by his employment, defendant nevertheless asserts that "the WCJ simply invented these facts [such as the fact that it would be dark at 10:00 p.m. and logical for defendant to seek a nearby parking space] to justify her findings." (Petition, p. 11:16.) We view this assertion in defendant's pleading as evidence of misconduct on the part of defendant's attorney in that it directs language to the WCAB that impugns the integrity of the WCAB or one of its judges. (Cal. Code Regs., tit. 8, § 10421(b)(9)(B).)

Transcript of Applicant, July 21, 2021, p. 13:8-17.) At trial, applicant testified that he was accompanying his co-worker, who was looking for parking. (*Id*., pp. 24:15-24, 47:8-13, 48:18-49:6.) It follows that we are unable to discern any material inconsistency between applicant's deposition and trial testimony regarding what he was doing as a passenger in his co-worker's car before the accident. We therefore conclude that defendant's argument that the WCJ ignored applicant's testimony in order to determine that he testified credibly is without merit.

As such, we recognize the WCJ's determination that applicant testified credibly, and accord her determination great weight because she had the opportunity to observe applicant's demeanor at trial; and, as we explained, the record before us lacks evidence of considerable substantiality that would warrant our rejection of her determination . (Report, pp. 6-17; *Garza v. Worker's Comp. Appeals Bd*. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].)

Accordingly, we will affirm the WCJ's finding that applicant sustained injury AOE/COE.

We next address defendant's contention that the WCJ engaged in misconduct by acting as a coach for applicant. Here we observe that all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157–158 [65 Cal.Comp.Cases 805].) Due process requires that a party be provided with reasonable notice of the proceedings and an opportunity to be heard. (*Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 711–712 [57 Cal.Comp.Cases 230].) A failure to provide sufficient notice, which deprives the meaningful opportunity to object or present evidence, is a violation of due process of law. (See *Fortich v. Workers' Comp. Appeals Bd.* (*Fortich*) (1991) 233 Cal.App.3d 1449, 1452–1454 [56 Cal.Comp.Cases 537]; see also *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 175 [36 Cal.Comp.Cases 93, 102].)

Without citing supporting authority or asserting how the WCJ's conduct could have caused it prejudice or violated any rule, defendant argues:

> There were several instances in which the Court goes off the record following a response by Applicant with that response changing after the discussion off the record. (See Trial Transcript at 32:9-21; 35:12-36:6; 38:15-39:7.) As the record shows, on the first occasion, Applicant changed his testimony from a "yes" to an "I don't know" after the Court went off the record. On the third occasion, Applicant changed his testimony from "yeah" to "they must have misunderstood what I said" after the Court went off the record. Based on the recollection of counsel for Liberty, this was the one instance he can specifically recall of such coaching. (Munoz Decl., at ¶ 3, filed concurrently with Petition.) An example of this also occurred on the

> record with an unnecessary instruction by the WCJ to the Applicant that it is acceptable for him to respond with an "I don't know" or "I don't remember." (See Trial Transcript at 44:13-45:11.)
> (Supplemental Petition, p. 4:18-27.)

Here, neither the Petition nor the Supplemental Petition provide a legal or evidentiary basis to support the suggestion that the WCJ engaged in misconduct. Moreover, our review of the record reveals no conduct by the WCJ other than ordinary attempts to clarify matters or instruct a witness regarding applicable rules of testimony. Furthermore, the record reveals no objection to or description of any off-the-record statement or act by the WCJ which could evidence error or a violation of defendant's right of due process.

In addition, we recognize that mere informality in the procedure in which witness testimony is elicited cannot serve as a basis to invalidate a WCJ's decision. (See § 5709.)

Thus, we conclude that there is no basis in the record before us to suggest that the WCJ deviated from her role of finder of fact, and we conclude that defendant's argument of misconduct is without merit.

Statutory law imposes upon every attorney licensed in California a duty to "maintain the respect due to the courts of justice and judicial officers" and explicitly authorizes sanctions against individual attorneys who engage in misconduct. (Bus. & Prof. Code, § 6068; § 5813.)

Here, we cannot ignore that defendant's Petition and Supplemental Petition contain evidence that defendant's attorney directed language to the Workers' Compensation Appeals Board that impugns the integrity of the Workers' Compensation Appeals Board and one of its judges and is therefore subject to sanctions. (Cal. Code Regs., tit. 8, § 10421(b)(9)(B).)

We also note defendant's attorney has been previously advised that "[f]ailure to comply with the WCAB's rules in the future may result in the imposition of sanctions." (Opinion and Order Dismissing Petition for Reconsideration and Denying Petition for Removal, January 10, 2022, p. 2.)

Accordingly, we will amend the F&A to defer the issue of whether defendant's attorney is subject to sanctions.

Having determined the merits of the Petition, we observe that the F&A inadvertently omitted to identify a body part to which applicant sustained injury. Here, the record shows that applicant's physicians at San Francisco General Hospital, Kaiser Permanente, and PQME Rakkar diagnosed him with an injury to the right hand resulting from the accident. (Ex. 1, San Francisco

General Hospital Records, April 20, 2021, p. 3; Ex. F, Excerpts of Subpoenaed Records from Kaiser Permanente Medical Center, p. 11; Request to File Supplemental Petitions with Attachments, March 29, 2022, Exhibit A, Report of Dr. Rakkar, March 7, 2022, pp. 17-18.)

It is thus clear that substantial medical evidence establishes that applicant sustained injury to this right hand. Accordingly, we will amend the F&A to find that applicant sustained injury to his right hand and to defer the issue of whether applicant sustained injury to additional body parts.

Accordingly, we will affirm the F&A, except that we will amend to find that applicant sustained injury to his right hand, defer the issue of whether applicant sustained injury to additional body parts, and defer the issue of whether defendant's attorney is subject to sanctions pursuant to section 5813 and WCAB Rule1042, and we will return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings of Fact and Award issued on February 4, 2022 is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Award issued on February 4, 2022 is **AFFIRMED,** except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Miguel Contreras, while employed by Shift Technologies, Inc., in California on April 20, 2021, as a "Driving Logistics Associate/Driver," sustained injury to his right hand arising out of and in the course of employment.

* * *

4. The issue of whether applicant sustained injury to additional body parts arising out of and in the course of employment is deferred.

5. The issue of whether defendant's attorney is subject to sanctions pursuant to section 5813 and WCAB Rule1042 is deferred.

* * *

IT IS FURTHER ORDERED THAT this matter is hereby **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 25, 2022

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

MIGUEL CONTRERAS
LAW OFFICES OF NADEEM MAKADA
LITTLER MENDELSON

SRO/*pc*

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

III. Legal Analysis

1. Defendant argues applicant has not met COE burden of proof

Defendant argues that since applicant's injuries occurred while applicant was off the work premises pursuing a personal errand, he did not meet his burden of proving he was in the "course of employment" when the auto accident occurred and he sustained his injuries. This is the general rule. However, as with all rules, there are exceptions. The applicable exception in this case is the "Personal Comfort Doctrine."

2. Applicability of the "Personal Comfort Doctrine"

The "parking spot swap" applicant engaged in with his co-worker would be no different than if the Mr. Contreras had taken a "coffee break" or used the "restroom," All of these "deviations" from his work duties would be classified as "personal comfort breaks," and are deemed by case law cited below to have occurred in the course of employment. There is an interesting pull quote from the WCAB ***en banc*** decision of ***Fitzgerald v. Hamerslag Equipment***, (1977) 42 Cal Comp Cases 773 which reads as follows:

> "The clearest example [of the application of the "personal comfort doctrine"] is the recent case of ***Vlahovic Sewing Contractors and Employers Mutual Liability Insurance Company of Wisconsin v. WCAB (Cepeda*)** (1977) 43 Cal. Comp. Cases 12 (writ denied). In that case, the applicant was struck by an automobile in a public street on her coffee break while 'buying coffee at a canteen truck near her employer's premises. The applicant was on an uncompensated coffee break. The applicant was found to be acting for the mutual comfort and convenience of herself and her employment when injured.

The relevant facts in the instant case are similar to those in ***Cepeda***. In the instant case, Mr. Contreras initially parked his car in the employer's customer parking lot before starting work on 4/20/2021. After performing his first work task of the day, he mentioned that he had to move his car from the customer parking lot to street parking off of the work premises. A co-worker, Mr. Obed Orellana overheard the conversation and offered to swap his parking space with applicant. Mr. Orellana's shift ended at 4:00pm that day while it would still be light out, whereas Mr. Contreras' shift ended at 10:00pm when it would be quite dark.

Clearly, it would be far safer for Mr. Contreras to walk, late at night, to a parking space within steps of his workplace, than attempt to search for his car on a roadway farther away from the worksite. It is logical that the parking place swap would take place such as it did between two amicable co-workers.

As noted in the timeline above, applicant parked in his co-worker's spot on the street, and then according to applicant's credible testimony, he hopped in Mr. Orellana's car to attempt to find a parking space for Mr. Orellana's vehicle. Minutes later, Mr. Orellana's car collided head on with another vehicle, killing Mr. Orellana and seriously injuring applicant.

As in the ***Cepeda*** case mentioned above, "the applicant [is] found to be acting for the mutual comfort and convenience of [himself] and [his] employer and, therefore, was in the course of [his] employment when injured."

For similar fact situations and holdings, see the following cases as outlined in the WCAB ***en banc*** decision of ***Fitzgerald v. Hamerslag Equipment***, (1977) 42 Cal Comp Cases 773:

> In the case of ***Plascencia v. Hyundai Capital America***, 2018 Cal Wrk Comp PD LEXIS 579 (WCAB Panel Decision) applicant was engaged in the process of swapping parking spots with her daughter, when she stepped in a pothole and injured herself. The WCAB held, "it is reasonably contemplated that workers will access the employer's driveway and parking lot, notably during a paid break, and the course of employment is not broken by the errand of moving applicant's personal car."
>
> In the case of ***Hariford Accident & Indemnity v. WCAB (Bloxham***) (2015) 80 Cal Comp Cases 1079 (5th DCA writ denied), applicant, a car salesman drove to a nearby store to pick up cigarettes. In that case the WCJ noted, "The WCJ added that the personal comfort doctrine was not strictly limited to injuries suffered on an employer's premises, that Defendant could not credibly contend that Applicant had abandoned his employment when he received permission to run his errand, and that evidence was presented that employees were allowed to leave the jobsite and run errands, frequently bringing back coffee, snacks or other objects of convenience for co-workers who remained behind working."
>
> In the case of ***Ildefonso (Deceased) v. Mrs. Gooch 's Natural Food Markets, Inc.***, 2021 Cal Wrk Comp PD LEXIS 211. (WCAB Panel Decision), applicant had left the work premises briefly in his personal vehicle on a private errand when he was killed in a car accident. The WCAB held that pursuant to the "personal comfort doctrine,." the employee's brief departure from the employer's

premises during an unrestricted paid break was an act of 'personal convenience' that was 'reasonably contemplated by the employment' and, therefore, within the course of employment.

IV. Applicant's Credible Testimony

Applicant's credible testimony summarized in the Minutes of Hearing meets the test for sustaining his burden of proof.

V. All Other Issues

Since the applicant had arrived at and had begun his work duties on the day in question, the "going and coming" rule is not applicable. All other issues (including but not limited to, permanent disability, apportionment, attorney's fees, sanctions and penalties) are deferred at this time, with WCAB jurisdiction reserved in the event that the parties are unable to resolve this issue amongst themselves.