WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EDIL DAVID MELENDEZ BANEGAS (DECEASED), ***Applicant***

vs.

BAYVIEW ENVIRONMENTAL SERVICES; GREAT DIVIDE INSURANCE COMPANY, Adjusted by BERKELEY ENTERTAINMENT, ***Defendants***

Adjudication Number: ADJ12177450
Oakland 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.

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued on September 1, 2020, wherein the workers' compensation administrative law judge (WCJ) found that applicant did not sustain injury arising out of and in the course of employment (AOE/COE) and that all other issues are moot. The WCJ ordered that applicant take nothing on his workers' compensation claim.

Applicant contends that the WCJ erred by misapplying the commercial traveler rule to the evidence in the record.

We received an Answer from defendant.

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

We have reviewed the Petition for Reconsideration, the Answer, and the contents of the Report. Based upon our review of the record, and as discussed below, we will rescind the F&O, substitute new findings that applicant sustained injury AOE/COE and that all other issues are deferred, and return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On August 4, 2020, the matter proceeded to trial. (Minutes of Hearing and Summary of Evidence, August 4, 2020, p. 1.) The parties stipulated in pertinent part that (1) while employed as a laborer on July 29, 2018, applicant claims to have sustained injury to his entire body, resulting in death on August 15, 2018; and (2) applicant's minor son, David Melendez Garcia, was a dependent of applicant at the time of injury. (*Id*., p. 2:8-19.) The parties identified the following relevant issue for trial: injury AOE/COE. (*Id.*, p. 2:26.)

In the Report, the WCJ writes:

> Edil "David" Melendez Banegas was employed as a laborer for Bayview Environmental Services on July 29, 2018, at which time he was involved in a motor vehicle accident on Interstate 5 in Kern County, California. A passenger in Mr. Melendez Banegas' vehicle, Christian Agusto Avilagarcia, died at the scene. Mr. Melendez Banegas succumbed to his injuries at Kern Medical Center on August 15, 2018.
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> Mr. Melendez Banegas' putative wife, Sintia Garcia, is pursuing a workers' compensation claim for Mr. Melendez Banegas' death. The principal benefit at issue is death benefits for the minor, Jorge David Melendez Garcia, for whom Sintia Garcia is Guardian ad Litem. . . .
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> Applicant's attorney took the deposition of Daniel Ledesma, identified as a General Superintendent of the employer, and Juan Saragosa, the Supervisor at the project at which the decedent was working (depositions of these two individuals are in evidence as Defendant's Exhibits A and B, respectively). Mr. Saragosa testified at the Trial.
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> The following statement of facts is based on the testimony of Mr. Ledesma and Mr. Saragosa.
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> Mr. Saragosa was the Supervisor of a project to remove asbestos from a high school in Santa Monica. Decedent was one of the workers on the project . . . [who] resided in the San Francisco Bay Area, and others were recruited from southern California. Neither Mr. Saragosa nor Mr. Ledesma was sure when the project commenced. . . . At first, the work on the project was proceeding five days a week, Monday through Friday. At some point, it was

> determined that insufficient progress was being made, and the employees were put on a six day a week work schedule.
>
> The employer provided the employees who were from the San Francisco Bay Area with a lump sum payment of $125.00 to cover one roundtrip from the Bay Area to Santa Monica. While the project was in process, the employer provided for lodging for the employees at a Motel 6. The lodging was available, and generally paid for, on a seven days per week basis. If a worker left the motel for a night or two, the employer notified the motel and asked for a rebate. The worker would have to re-register upon returning to the motel. In addition, the employer provided a $20.00 per day stipend for a food allowance. It wasn't clear from the testimony whether this allowance was only made during days worked, or days spent at the Motel 6, or was paid on a seven-day-a-week basis.
>
> The workers who lived in the Bay Area sometimes returned to the Bay Area from southern California for a weekend or simply for a Sunday when they were working six days a week. On questioning by the Judge, Mr. Saragosa testified that he himself returned to the Bay Area around five or six times during the duration of the project.
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> On Saturday, July 28, 2018, a generator blew at the jobsite about 11:30 a.m., and work was forced to stop. Decedent advised Mr. Saragosa that he would be driving to the Bay Area and returning for work the following Monday.
> (Report, pp. 2-4.)
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> Mr. Saragosa's testimony at deposition was that he advised Mr. Banegas as a friend that he shouldn't expend the energy [to return to the Bay Area] because the work they were doing was so tiring. Defendant's Exhibit B, 29:19-30:1 . . .
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> [T]here was some question as to the reason for Mr. Banegas driving to the Bay Area. Applicant contends that the reason was to see his family, including his one-year old son. . . . Mr. Saragosa's deposition testimony [was that] the decedent told [him] that he was driving to the Bay Area to play soccer. Defendant's Exhibit B, 27:14-17.
> (Report, p. 7.)

DISCUSSION

A "commercial traveler is regarded as acting within the course of his employment during the entire period of his travel upon his employer's business." (*Wiseman v. Industrial Acc. Comm.*

(1956) 46 Cal.2d 570, 572 [21 Cal.Comp.Cases 192].) The Supreme Court has made clear that, "[i]n the case of a commercial traveler, workers' compensation coverage applies to the travel itself and also to other aspects of the trip reasonably necessary for the sustenance, comfort, and safety of the employee." (*LaTourette v. Workers' Comp. Appeals Bd*. (1998) 17 Cal.4th 644, 652 [63 Cal.Comp.Cases 253].) As the Court of Appeal observed, an employee away on business can "hardly [be] expected to remain holed up in his hotel room." (*Fleetwood Enterprises, Inc. v. Workers' Comp. Appeals Bd*. (*Moody*) (2005) 134 Cal.App.4th 1316, 1327 [70 Cal.Comp.Cases 1659].)

The test is whether the activity during the injury is one "that an employer may reasonably expect to be incident to its requirement that an employee spend time away from home." (*IBM Corp. v. Workers' Comp. Appeals Bd.* (*Korpela*) (1978) 77 Cal.App.3d 279, 283 [43 Cal.Comp.Cases 161].) This rule is construed liberally in favor of injured employees. (*Korpela*, *supra*, at p. 282 (citing Labor Code section 3202).)

In *Korpela,* the issue presented was whether an employee's death from an automobile accident while on a weekend trip to visit relatives during the course of an out-of-town training program was compensable under the commercial traveler rule. Evaluating whether the weekend trip was within the course of employment or a non-compensable "distinct departure on a personal errand," the court found that the weekend trip was a leisure time activity normally incident to an out-of-town temporary assignment, a conclusion further supported by the fact that the employee's supervisor knew of the visit and encouraged it. (*Korpela, supra,* at p. 283.)

Similarly, in *Hanford Cmty. Med. Ctr. v. Workers' Comp. Appeals Bd*., 81 Cal.Comp.Cases 1039, 2016 Cal. Wrk. Comp. LEXIS 118 (writ den.), the Court of Appeal upheld the WCAB's finding that an employee's accidental death while traveling from his Fresno home to attend the second day of an off-site conference in Pismo Beach after having departed the conference the previous day to be home with his daughter who had just given birth was compensable under the "commercial traveler" doctrine. (See *Skubitz v. Hanford Community Hosp*., 2016 Cal. Wrk. Comp. P.D. LEXIS 168, pp. 18-20.)

Here, as stated by the Report, the record shows that defendant's workers who resided in the Bay Area and worked on its project in Santa Monica would return to the Bay Area for a weekend or a Sunday. (Report, p. 4.) Defendant's supervisor, Mr. Saragosa, testified that he

himself returned to the Bay Area approximately five or six times during the duration of the project. (*Id*.)

Further, defendant made lodging available for its employees based in the Bay Area without expecting the employees to stay in the lodging all seven nights of the week. (See *Id*., pp. 3-4.) In particular, defendant would seek a rebate whenever an employee chose not to stay in the lodging for one or two nights. (*Id.*, p. 4.)

Further, applicant advised defendant that he would be traveling to the Bay Area on the morning of Saturday, July 28, 2018, after work on the project came to an unexpected halt until the following Monday. (*Id*., p. 4.)

Thus, the record reveals that applicant's travel to the Bay Area during his time off was a practice which defendant expected of its employees; and, more specifically, that defendant's supervisor knew of applicant's travel on the weekend of his death. (Report, pp. 4, 7.) Notably, defendant's supervisor did not object to applicant's travel as a deviation from his employment, but merely cautioned him as a "friend" that the travel would be tiring. (*Id*., p. 7.) It follows that applicant sustained injury while engaged in an activity which defendant reasonably expected to be incident to its requirement that applicant spend time away from home on its Santa Monica project—and not while engaged in a distinct departure from his employment.

Accordingly, we will rescind the F&O, substitute new findings that applicant sustained injury AOE/COE and that all other issues are deferred, and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Order issued on September 1, 2020 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant Edil "David" Melendez Banegas, deceased, while employed as a laborer by Bayview Environmental Services, insured by Great Divide Insurance Company, with claims adjusted by Berkeley Entertainment, sustained injury arising out of and occurring in the course of his employment on July 29, 2018.

2. All other issues are deferred.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 4, 2021

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

EDIL DAVID MELENDEZ BANEGAS (DECEASED)
THE LAW OFFICE OF MARK A. VICKNESS
PEARLMAN, BROWN & WAX

SRO/ara

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