WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GABRIEL MORA (DECEASED), ***Applicant***

vs.

CUSTOM FRESH CUTS, INC.; THE HARTFORD, ***Defendants***

Adjudication Number: ADJ11808374
Pomona District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Order of March 25, 2021, the workers' compensation administrative law judge ("WCJ") found that on February 9, 2017, the decedent, Gabriel Mora, was employed as a warehouse supervisor at Los Angeles, California, by Custom Fresh Cuts Incorporated, whose workers' compensation insurance carrier was The Hartford. The WCJ also found that the fact that Mr. Mora's killer, Eduardo Ortiz, had become an independent contractor after having been a full-time employee, was not a contributing cause of the shooting, that there was no outstanding loan from Mr. Mora to Mr. Ortiz because it was repaid by the new owner, Mr. Richard Wise, and that the loan was not a contributing cause of the shooting. In addition, the WCJ found that there was no evidence Mr. Ortiz was a disgruntled employee, that Mr. Mora had a close enough personal relationship to Mr. Ortiz to refer to Mr. Mora as his brother, that the claim of Mr. Mora's dependents for death benefits is barred by reason of the going and coming rule, and that the dependents did not meet their burden of proving that the nature of Mr. Mora's employment gave rise to the special risk exception of the going and coming rule.[1] In an uncontested finding, the WCJ also determined that the employer had knowledge of the injury to trigger the provision of the notice of potential eligibility to Mora's dependents, which was not provided, thereby tolling the Statute of Limitations and making the dependents' claim timely.

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[1] This opinion will refer to Mr. Mora as "Mora" and to Mr. Ortiz as "Ortiz."

Mora's dependents ("petitioners") filed a timely petition for reconsideration of the WCJ's decision. Petitioners contend that Mora's death is excepted from the going and coming rule because he was within the zone of danger and his employment created a special risk. Petitioners further contend that the evidence does not justify the WCJ's conclusion that Mora had a close personal relationship with Ortiz, and that the WCJ erred in concluding that the cause of conflict between Mora and Ortiz was anything other than related to Mora's employment by Fresh Cuts. Finally, petitioners contend that the evidence does not justify the WCJ's findings that Ortiz's alleged disgruntlement, his independent contractor status, and the existence of a prior loan from Ortiz to Mora did not contribute to Mora's death.[2]

The Hartford filed an answer, which has been considered.

The WCJ submitted a Report and Recommendation ("Report").

Based on our review of the record and applicable law, we conclude the preponderance of evidence establishes that Mora's death arose out of and occurred in the course of employment. (Lab. Code, § 3202.5.) As our Decision After Reconsideration, we will rescind the WCJ's decision and substitute our finding that Mora's death is compensable, and we will return this matter to the WCJ for further proceedings to determine benefits.

BACKGROUND

The WCJ's Report provides a brief overview of the circumstances of Mora's death:

> The decedent [Mora], a warehouse supervisor for Custom Fresh Cuts worked generally from 8:00 a.m. to 4:00 p.m. or 5:00 p.m. (MOH 12/15/20 pg. 12:3.5-5) He was shot on February 9, 2017. On the day of the shooting, there were approximately twenty vehicles parked along Bay Street. (App. Ex. 14, 1st Still Photo, Def. Ex. B Map) Surveillance video and still photos from the video show that the shooter, [Ortiz] backed his van into a parking stall on Bay Street adjacent to the purple gate that separated Bay Street from the employer's parking lot so that the driver's side was towards the employer's parking lot. (MOH 12/15/20, Pg. 7:9-18, App. Ex. 11 1st Still photo time of 17:31.41) [Mora's] white vehicle [backed out of] the employer's parking lot and backed completely into Bay Street. He stopped his vehicle with his driver's side door facing towards the

[2] Petitioners obtained transcripts of the two trial hearings in this matter. However, the Appeals Board is not obliged to review trial transcripts in order to test the accuracy and completeness of the Summary of Evidence, unless the petitioner points to specific, material defects in the Summary of Evidence. (*Allied Compensation Ins. Co. v. Ind. Accident Comm.* (*Lintz*) (1961) 57 Cal.2d 115 [26 Cal.Comp.Cases 241].) In their petition for reconsideration herein, petitioners do not point out any such defects. Therefore, we need not review the trial transcripts. We find it sufficient to review and rely upon the Summaries of Evidence.

driver's side of the shooter's van. (App. Ex. 11 1st Still photo time of 17:31.41, MOH/SOE pg. 8:23-25, Segment 3 Camera 14) The decedent was shot by Mr. Ortiz at 5:32 p.m. (App Ex. 14, 3rd photo, MOH 12/15/20 pg. 8:25-9.5). After the shooting [Mora] continued driving up Bay Street eventually succumbing to his injuries at the nearby intersection of Bay and Mateo Street. (MOH pg.8:10-10.5, App. Ex. 1 Death Certificate) [Mora] was not conducting duties for the employer at the time the shooting occurred. (Def Ex. A denial letters 2/14/19 and 2/15/19)[3]

[Mora] started the company Custom Fresh Cuts in February 2015. In June 2015 [Mora] had Mr. Richard Wise assume ownership of the company. In exchange, Mr. Wise assumed all debts including a $14,000.00 loan that [Mora] had from [Ortiz]. This loan was paid off in April or May of 2016. Prior to the shooting, [Mora] had introduced [Ortiz] as his brother to Richard Wise in 2015. After Mr. Wise took ownership of the company, [Ortiz] continued to do work as an independent contractor for the company until 2016 for which he was paid. [Ortiz] continued to go to Custom Fresh Cuts 2-3 times per week and as recent as one week prior to the shooting.

The applicant, Ms. Maria Perez, [Mora's] live-in [girlfriend had her] rear car windows…broken the same week as [Mora's] death (MOH 3/1/21 Ms. Perez testimony pg. 3:19-22) and also the week of 7/22/17 but nothing was taken. Police believed the broken windows were related to [Mora's] murder.[4] Ms. Perez relocated and transferred her kids to a new school. (Def Ex. "E" Except from Transforming Life Center pg.11/31)

DISCUSSION

I. MORA'S DEATH AROSE OUT OF EMPLOYMENT

The general principles relevant to the inquiry whether an injury or death arises out of and occurs within the course of employment ("AOE/COE") are well-settled. In *Guerra v. Workers'*

[3] The WCJ's statement that Mora was not conducting duties for the employer at the time of the shooting is not a statement of fact. The statement is an *assertion* made in defendant's claim-denial letters found within defense Exhibit A, which refers to no *evidence* to establish the *assertion* as a fact.

[4] The WCJ's statement that the police believed the broken windows in Ms. Perez's car were related to Mora's murder is speculation. No police reports are in evidence. Otherwise, Exhibit E (pp. 11-31) includes a "Transforming Life Center" therapy record noting that Ms. Perez "shared" with her therapist that "law enforcement is taking [the broken windows] as part of [Mora's murder]" because "nothing was taken and…it was the back windows." We take the therapy record as speculation not least because it is based on doubtful hearsay - the therapist said that Ms. Perez said that the police indicated the broken windows were related to Mora's murder.

Comp. Appeals Bd. (2016) 246 Cal.App.4th 1301, 1307-1308 [81 Cal.Comp.Cases 324] ("*Guerra*"), the Court of Appeal provided a helpful overview:

> The statutory requirement that the injury must have occurred "in the course of the employment" ordinarily refers to the time, place and circumstances under which the injury is sustained. (See *Griffin v. Industrial Acc. Com.* (1937) 19 Cal.App.2d 727, 732–733 [66 P.2d 176]; 1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed.) § 4.03, p. 4-36 (rel. 73-4/2011).) [In the *Guerra* case, there was] no question that [the injured employee's] death occurred while he was at work during work hours while wheeling an overflowing trash can on a dolly to the dumpster.
>
> The term "arise out of the employment" means that the injury must be proximately caused by the employment. (1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation, supra, § 4.02[2], p. 4-16 (rel. 67-4/2008).) "'If the disability, although arising from a [preexisting nonindustrial condition], was brought on by any strain or excitement incident to the employment, the industrial liability still exists. […] .'" (*California etc. Exchange v. Ind. Acc. Com.* (1946) 76 Cal.App.2d 836, 840 [174 P.2d 680].)

Further, "when a third party intentionally injures the employee and there is some personal motivation or grievance, there has to be some work connection to establish compensability."[5] (*Atascadero Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Garedes*) (2002) 98 Cal.App.4th 880, 884 (67 Cal.Comp.Cases 519) [claimed psychiatric injury from co-workers' gossip about applicant's personal life did not arise out of employment].)

If such a connection is shown, however, the burden shifts to the employer to prove a personal motive for the injury. (*Ephraim v. Certified Sandblasting Co.* (1968) 33 Cal.Comp.Cases 599 (Appeals Board en banc) [claim of unintended victim who survived workplace shooting by unidentified assailant found compensable, but if victim had died, burden would have shifted to defendant to prove personal motive for shooting]; *Lee v. Workers' Comp. Appeals Bd.* (*Rincon*) (2012) 77 Cal.Comp.Cases 297 (writ den.) [liquor store clerk, shot and killed by unknown assailant in store, arose out of employment]; *Jethro Cash & Carry v. Workers' Comp. Appeals Bd.* (2008) 73 Cal.Comp.Cases 698 (writ den.) [laborer found shot to death by unknown assailant in employer's locker room, arose out of employment].)

[5] String citations omitted.

In this case, the WCJ concluded that petitioners "did not meet the burden of proof that the shooting had a connection to the employment." (Opinion on Decision, p. 4.) However, the only factors considered by the WCJ in reaching this conclusion are that though Ortiz loaned money to Mora in 2015 to start the business at which they both worked, Mr. Wise assumed all debts and paid off the loan in question, and there was a gap of some nine or ten months between the time Wise took over the business in April or May 2016 and the time of the shooting.[6] The WCJ reasoned that since the loan had been paid off and Ortiz had waited months to kill Mora, petitioners failed to show that Ortiz's loan to Mora was a "contributory cause" of the shooting. (Opinion on Decision, p. 5.)

We disagree. As noted above, the law only requires petitioners to show "some work connection" between Mora's employment and his shooting death at the hands of Ortiz. In our view, this burden of proof does not require petitioners to prove that a specific issue – such as the loan from Ortiz to Mora – directly caused Mora's death. Similarly, petitioners were not required to prove that Ortiz was a "disgruntled" co-worker, as discussed in the WCJ's Opinion on Decision and Report.

Moreover, we take a different reading of the record than the WCJ. We are persuaded that the evidence supports a strong and reasonable inference that Ortiz's shooting of Mora was connected to Mora's employment by Mr. Wise.[7] Ortiz had loaned money to Mora to fund a business started by Mora, who then transferred the business to Mr. Wise, with Mora retained as a managing employee and Ortiz retained as an independent contractor. In our view, these circumstances and the relationship between the three men (further discussed below) easily establish that Ortiz's shooting of Mora must have been connected to Mora's continued employment by Mr. Wise - even though the exact nature of the connection will never be fully known.

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[6] The WCJ also considered that the shooting may have been "work-connected" because Mora was leaving work when he encountered Ortiz, which gave Ortiz the opportunity to kill him. Although the issues of "AOE" and "COE" are closely related, it appears that Mora's location when Ortiz shot him is more germane to the issue of "COE," i.e., the "time and place" of Mora's death.

[7] Petitioners need not "show that an inference in [their] favor is the only one that may be reasonably drawn from the evidence; [they] need only show that the material fact to be proved may logically and reasonably be inferred from the circumstantial evidence. […] The mere fact that other [adverse] inferences…might be drawn does not render the [favorable] inference too conjectural or speculative for consideration [by the trier-of-fact]." (See *Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, 1309 [81 Cal.Comp.Cases 324], quoting *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 121, internal citations and internal quotation marks omitted.)

Per *Ephraim, supra,* the burden shifted to defendant to prove a personal motive for the shooting. That burden is not met, because the notion that Mora and Ortiz had a personal relationship or a relationship rooted in criminal activity is based upon speculation. In her Report (p. 8), the WCJ points out that Mora had introduced Ortiz to Mr. Wise as Mora's brother, suggesting Mora had a close personal relationship with Ortiz. However, Mr. Wise's trial testimony shows that this introduction occurred on June 1, 2015, the same time that Mr. Wise purchased the business from Mora and assumed its debts, including the $14,000.00 Mora borrowed from Ortiz. However, we take the "brotherly" introduction between the three men as yet another connection to work. Seen as such, Mora's introduction of Ortiz as his "brother" supports a reasonable inference that Mora's death arose out of his employment with Mr. Wise. We find considerable significance in the fact that Mr. Wise, the employer, positively benefitted from the relationship between Mora and Ortiz.[8] This is shown by Mr. Wise's trial testimony that Mora, on Mr. Wise's behalf, would call Ortiz into work as an independent contractor. Mr. Wise also testified that Ortiz would prepare an invoice for his work, and that Ortiz would give the invoice to Mora, who in turn would give it to Mr. Wise for payment. Mr. Wise would then pay the invoice by giving Mora a check addressed to Ortiz, which "was the last time [Mr. Wise] saw that check." (Summary of Evidence, 12/15/20, p. 11:6-13.)[9] In other words, Mora paid Ortiz, on Mr. Wise's behalf, for work done by Ortiz as an independent contractor. Thus it is reasonably clear that in matters concerning Ortiz, Mora acted as a "go-between" for the employer.

Finally, we note that Ms. Perez, Mora's live-in partner, testified that Mora and Ortiz did not have a personal or criminal relationship outside of work. The WCJ did not find this testimony to be credible. But even if the two men had such a relationship, we are not persuaded it outweighs the evidence discussed above, which supports a reasonable inference that Ortiz's shooting of Mora was connected to Mora's employment by Mr. Wise. (Lab. Code, § 3202.5.)

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[8] Although the instant case does not involve the "required vehicle" exception to the going and coming rule, the beneficial work relationship between the three men also supports the conclusion that Mora's death occurred in the course of employment. (See *Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1041 (82 Cal.Comp.Cases 692) [vehicle accident during bike transit of caretaker between clients' homes excepted from going and coming rule; caretaker's transit "bestowed a direct benefit" on the employer and therefore was part of the employment relationship].)

[9] As Mr. Wise did not speak Spanish, it also appears he benefitted from Mora serving as Mr. Wise's translator in communicating with Ortiz. (Summary of Evidence, 12/15/20, pp. 9:24-10:5.)

II. MORA'S DEATH OCCURRED IN THE COURSE OF EMPLOYMENT

There is no dispute that Mora was shot to death by Ortiz on a public street, just after Mora had finished work and just after he had exited his employer's parking lot. (Exhibit 11.)[10] Since Mora apparently had begun his commute home from work, the question is whether compensation for his death is barred by the going and coming rule. In general, the rule bars compensation for injuries sustained during an ordinary commute as outside the course of employment; an ordinary commute usually takes place outside the normal hours and location of work. (See *Santa Rosa Junior College v. Workers' Comp. Appeals Bd.* (*Smyth*) (1985) 40 Cal.3d 345 [50 Cal.Comp.Cases 626].)

In determining whether Mora's death occurred within the course of employment, we consider whether the "special risk" exception to the going and coming rule applies under the circumstances of this case. In *Parks v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 585 [48 Cal.Comp.Cases 208] ("*Parks*"), our Supreme Court concluded that the assault of a school teacher in her car, on a public street immediately after she left the school parking lot to go home from work, occurred in the course of employment. According to the Court, there was a special risk to the teacher, not faced by the general public, because her car had been immobilized by departing school children, who had blocked traffic on the public street.

In *Parks*, the Court applied a two-prong test it had developed in an earlier case, *General Ins. Co. v. Workers' Comp. Appeals Bd.* (*Chairez*) (1976) 16 Cal.3d 595 [41 Cal.Comp.Cases 162] ("*Chairez*"). Under the two-prong test of *Chairez* and *Parks*, the special risk exception to the going and coming rule applies (1) if "but for" the employment the employee would not have been at the location where the injury occurred; and (2) if "the risk is distinctive in nature or quantitatively greater than risks common to the public." (*Parks*, 33 Cal.3d at 590, quoting *Chairez* at 16 Cal.3d 595, pp. 600-601.) Further, the overarching principle of liberal construction under Labor Code section 3202 applies to determining whether there is a special risk exception to the going and coming rule, in which case reasonable doubts are resolved in the employee's favor. (*Parks*, 33 Cal.3d at 593.)

[10] Exhibit 11 is a series of three still photos taken from a video that depicts Ortiz and Mora before, during and a little after the shooting. The public street in question, "Bay Street," was the theatre in which the shooting took place. The still photos show that Bay Street is more accurately described as a back alley.

In the instant case, there is no question that the first prong of *Parks* is satisfied because Mora would not have been shot on Bay Street, just after work, but for his employment by Fresh Cuts. Accordingly, the compensability of petitioners' claim for death benefits turns on whether the second prong of *Parks* is satisfied.

In *Parks*, the Court noted that the teacher was regularly subjected at the end of each day's work to the risk of becoming blocked by school children in traffic, and of becoming a "sitting duck" for an assault. According to the Court, this risk to the teacher, though common to the public at large, was occasioned by reason of her employment and was peculiarly and to an abnormal degree thrust upon her; the risk was quantitatively greater than that to which passing motorists might be subjected on a sporadic or occasional basis. (*Parks*, 33 Cal.3d at 592-593, quoting *Freire v. Matson Navigation Co.* (1941) 19 Cal.2d 8, 13 and *Chairez* at 16 Cal.3d at 601, internal quotation marks omitted.) In the same passage of *Parks*, the Court concluded: "Parks' employment required her to pass through the zone of danger each day. As such, her employment created a special risk in leaving the school parking lot. The going and coming rule may not be applied to preclude her from recovering compensation benefits."

In this case, the WCJ states in her Opinion on Decision that Mora was not regularly subjected to any peculiar risk at the end of the day, on a regular basis, like the school teacher in *Parks*. The WCJ notes that Ortiz apparently never argued with Mora or threatened to kill him, hence the WCJ was not persuaded that Mora regularly was subjected to the risk of getting shot by Ortiz due to the nature of Mora's job as a warehouse supervisor.

We do not share the WCJ's view of what it takes to satisfy the second prong of *Parks*. According to the WCJ, *Parks* requires petitioners to produce evidence virtually predicting that Ortiz would shoot Mora just outside the employer's parking lot. We disagree that *Parks* requires such a demanding burden of proof. Rather, we believe that a preponderance of evidence showing Mora was exposed to special risk is sufficient. (Lab. Code, § 3202.5.) In other words, it is enough for petitioners to show that Mora's employment put him at a special risk, not experienced by the public, of being violently confronted by Ortiz just outside the employer's parking lot.

We are persuaded that petitioners have met their burden. Ortiz, who was Mora's co-worker at Fresh Cuts, obviously had a dispute with him, the precise details of which are unknown but likely were connected to work, as previously discussed. Like the teacher in *Parks*, Mora was exposed to the risk, distinctive in nature *or* quantitatively greater than risks common to the public

using Bay Street, because Mora regularly used the employer's parking lot to access that alley. This risk was distinctive in nature or quantitively greater because the lot was used for employee parking, meaning that it was likely Fresh Cuts employees would use the alley with more frequency and regularity than the general public. The risk to Mora also was distinctive in nature or quantitively greater because he was more likely to encounter other Fresh Cuts workers, in close proximity to the Fresh Cuts parking lot, than the general public. In the event of being confronted by a co-worker who had a dispute with him, as happened here, Mora indeed was a sitting duck like the school teacher in *Parks*.

As pointed out by the WCJ, Ortiz backed his van into a parking stall on the public alley adjacent to the gate that separated the alley from the employer's parking lot, so that the driver's side was towards the employer's parking lot. Because Mora backed out of the employer's lot, his driver's side faced Ortiz's driver's side. (Exhibit 11.) Although Mora backed out and briefly got closer to Ortiz's driver's-side door before getting shot a few steps farther away, Ortiz's placement in the alley and his advance towards Mora's driver's-side door can fairly be described as an ambush. It is clear that by reason of Mora's job with Fresh Cuts, Ortiz knew that if he had a score to settle with Mora, he could find and confront him in that alley, right after the work day ended. This risk to Mora was surely distinctive in nature or quantitively greater than the risk to the general public who might use that alley during the day. This satisfies the second prong of *Parks*. We conclude that Mora's shooting death by Ortiz occurred in the course of employment.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of March 25, 2021 is **RESCINDED**, and the following Findings are **SUBSTITUTED** in its place:

FINDINGS

1. Gabriel Mora, while employed on February 9, 2017 as a warehouse supervisor at Los Angeles, California by Custom Fresh Cuts, whose workers' compensation carrier at the time of injury was The Hartford, sustained injury arising out of and occurring in the course of employment to his digestive and body systems due to gunshots to his abdomen, resulting in his death.
2. The employer had knowledge of the injury to trigger the provision of the notice of potential eligibility to the decedent's dependents, which notice was not provided, thereby tolling the Statute of Limitations and making the claim timely.
3. The claim is not barred by the going and coming rule.
4. The issue of dependency benefits is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and determination of the outstanding issues by the WCJ, including but not limited to dependency benefits, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 14, 2023

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

MARIA PEREZ GOMEZ
RAWA LAW GROUP
LAKEESHA JEMERSON

JTL/*ara*

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