WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GARY TIMSON, *Applicant*

vs.

OXFORD SUITES;
WCF NATIONAL INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ15117833
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued by a workers' compensation administrative law judge (WCJ) March 9, 2023, wherein the WCJ found that applicant failed to sustain his burden of proving industrial injury arising out of and in the course of his employment (AOE/COE) and ordered that applicant "take nothing further on this claim." Applicant contends that his injury was AOE/COE.

We have received an Answer from Defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the WCJ's Order, and return this matter to the WCJ for further proceedings.

FACTS

Applicant claimed industrial injury to his fingers and hand while employed as a maintenance technician on August 16, 2021. The admitted facts include that 1) applicant, while employed as a maintenance worker, claims to have sustained injury AOE/COE to his left ring finger, left middle finger, left pinkie finger, and left hand; 2) at the time of injury, the employer's workers' compensation carrier was WCF National Insurance Company; 3) the carrier/employer

has paid no compensation; 4) the employer has furnished no medical treatment; and 5) no attorney fees have been paid and no attorney fee arrangements have been made. (8/29/22 Minutes of Hearing and Summary of Evidence (MOH/SOE), p. 2.) The only issue was whether the injury was AOE/COE. (8/29/22 MOH/SOE, p. 2.)

Applicant testified that he was hired by the employer in April 2020, and his job duties included janitorial, trades work, repairing appliances, drywall, plumbing, and electrical, as well as other duties. (8/29/22 MOH/SOE, p. 3.) On the day of his injury, he was doing preventative maintenance in room 214 at his job location, including caulking. (8/29/22 MOH/SOE, pp. 3-4, 5.) The materials included both his own tools as well as the employer's tools; he brought his own tools as they did not have a proper tool cart at work, only a utility cart, and his employer's tools were inadequate. (8/29/22 MOH/SOE, p. 4, 5.) His job duties on the day of injury at the time his shift ended at 5:30 pm was to complete the new tool cart by shifting things over from the old cart, which was not a tool cart. (8/29/22 MOH/SOE, pp. 3, 5.) He brought his own tools, materials, and hardware daily until his employer bought a new tool cart, and his tools were stored in various locations at his job location. (8/29/22 MOH/SOE, p. 4.) His supervisor Steve Montenegro asked him to go to Home Depot that day to get supplies. (8/29/22 MOH/SOE, p. 5.)

After his shift ended at 5:30 pm, applicant got something to eat and then returned to the tool cart to complete it so that he could stop bringing his own tools to work. (8/29/22 MOH/SOE, p. 4.) No one told him to assemble the tool cart. (8/29/22 MOH/SOE, p. 5.) His work was "overwhelming" and he did not have time to assemble the tool cart while on the clock. (8/29/22 MOH/SOE, p. 4.) After working on the tool cart, he cleaned up the room from approximately 6:30 to 8:00 pm. (8/29/22 MOH/SOE, p. 4.) He then reached into the bathtub to grab the razor scraper that he used to scrape caulk and paint, lost his footing, and placed his hand on the soap dish, which shattered. (8/29/22 MOH/SOE, p. 4.) He screamed, put his hands together, went to the medicine cabinet near the front desk, and then informed the General Manager Vince on the phone around 8:30 pm about his injury. (8/29/22 MOH/SOE, p. 4.) Vince told him that he was not "covered." (8/29/22 MOH/SOE, p. 4.) He lacerated his left ring finger, severed nerves, and now had three injured fingers. (8/29/22 MOH/SOE, p. 3.)

According to applicant, other maintenance technicians also brought their own tools to work. (8/29/22 MOH/SOE, pp. 4-5.) His employer requested that he bring in a heavy duty hammer drill, ratchet straps, and a power cable. (8/29/22 MOH/SOE, p. 5.) Applicant exchanged

text messages with his employer about bringing his tools to work and his employer did not object. (8/29/22 MOH/SOE, p. 5.)

Applicant received a digital copy of the employee handbook but never read it. (8/29/22 MOH/SOE, p. 6.) He was unaware that the handbook said to leave personal property at home. (8/29/22 MOH/SOE, p. 6.) His supervisor Montenegro asked him to bring in his own tools and never told him to not bring in his tools prior to his injury. (8/29/22 MOH/SOE, p. 6.) He was aware that he was not supposed to use his employer's tools outside of the premises. (8/29/22 MOH/SOE, p. 6.) He was injured in a guest room that was not a public area but he accessed it to retrieve all of the items, both personal and company items. (8/29/22 MOH/SOE, p. 6.)

Maintenance supervisor Montenegro testified that he is applicant's direct supervisor and that applicant is knowledgeable and a tremendous help. (8/29/22 MOH/SOE, pp. 6-7.) Applicant followed directions "to a point" but also liked to put his own signature on projects. (8/29/22 MOH/SOE, pp. 6-7.) He had seen applicant use his own tools at work several times, including in September and October 2020, and warned him not to use personal tools at work. (8/29/22 MOH/SOE, p. 7.) He never asked applicant to bring his own tools to work. (8/29/22 MOH/SOE, p. 8.) He further testified that applicant could not have been assembling the tool cart on August 16, because the cart was not picked up from Home Depot until August 23, 2021. (3/1/23 MOH/SOE, p. 2.)

Antonio Geronimo, another maintenance technician at Oxford, testified that the employer previously did not have many tools but the employer bought more tools last year "after it happened." (3/1/23 MOH/SOE, p. 3.)

DISCUSSION

Labor Code section 3600(a)[1] provides for liability for injuries sustained "arising out of and in the course of the employment." An employer is liable for workers' compensation benefits "without regard to negligence." (Lab. Code, § 3600(a).) An employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.) Whether an employee's injury arose out of and in the course of

[1] All further statutory references are to the Labor Code unless otherwise noted.

employment is generally a question of fact to be determined in light of the particular circumstances of the case. (*Wright v. Beverly Fabrics* (2002) 95 Cal.App.4th 346, 353 [67 Cal.Comp.Cases 51].) Labor Code section 3600(a)(2) requires as a condition of compensation that "at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment."

The phrase "in the course of employment" "'ordinarily refers to the time, place, and circumstances under which the injury occurs.'" (*Latourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [63 Cal.Comp.Cases 253], citing *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal. 3d 729, 733.) An "employee is in the 'course of his employment' when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do." (*Latourette, supra*, at p. 651.) For the injury to arise out of employment, it must "'occur by reason of a condition or incident of [the] employment.' [citation] That is, the employment and the injury must be linked in some causal fashion. [citation]" (*Id.* at p. 651.) "'If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment, and are compensable." (*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. Industrial. Acc. Com. (Brooks)* (1964) 225 Cal.App.2d 517, 520-521 [29 Cal.Comp.Cases 43]; see also *Wright v. Beverly Fabrics*, *supra*, 95 Cal.App.4th at pp. 354, 357.) An employee picking up work related tools or equipment, even beyond the official work day, has been found to be a compensable injury. (*Mitchell v. Hizer* (1977) 73 Cal. App. 3d 499, 507 [42 Cal. Comp. Cases 884].)

"Acts of 'personal convenience' are within the course of employment if they are 'reasonably contemplated by the employment.'" (*Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 568 [49 Cal.Comp.Cases 773], citing *Pacific Indem. Co. v. Ind. Acc. Com.* (1945) 26 Cal.2d 509, 514 [10 Cal.Comp.Cases 131]; see also *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.* (1977) 69 Cal.App.3d 170, 176 [42 Cal.Comp.Cases 297]; *Vogt v. Herron Construction, Inc.* (2011) 200 Cal.App.4th 643, 650-654.) "[A]cts necessary to the life, comfort and convenience of the [employee] 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]." (*Price, supra,* at pp. 567-568.) Thus, even if

an employee is engaged in 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. Here, applicant was on the employer's premises and it is reasonably contemplated that applicant would pick up his tools before he left the job.

We now turn to the issue of whether applicant's picking up tools was a material deviation from applicant's duties. While a substantial or material deviation may take an employee out of the employment relationship, a slight deviation will not take the employee out of employment. (*Rankin v. Workers' Comp. Appeals Bd*. (1971) 17 Cal.App.3d 857, 860 [36 Cal.Comp.Cases 286]; *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd*. (1967) 67 Cal.2d 925, 928 [32 Cal.Comp.Cases 525]; *Western Pipe & Steel Co. v. Industrial Acci. Com. (Henderson)* (1942) 49 Cal.App.2d 108 [7 Cal.Comp.Cases 28].) "Mere deviation by an employee from a strict course of duty does not release the [employer] from liability. In order to have such an effect the deviation must be shown substantially to amount to an entire departure." (*De Mirjian v. Ideal Heating Corp*., *supra*, 129 Cal.App.2d at p. 766, citing *Dolinar v. Pedone* (1944) 63 Cal.App.2d 169, 175.) In the absence of an applicable statutory defense, misconduct that is negligent, willful, or even criminal "will bar recovery only when it constitutes a deviation from the scope of employment." (*Westbrooks v. Workers' Comp. Appeals Bd*. (1988) 203 Cal.App.3d 249, 253 [53 Cal.Comp.Cases 157] (*Westbrooks*).) Here, applicant picking up his tools was not a deviation, much less a substantial or material deviation.

Finally, the injury is still compensable even if there was a rule against an employee using their own tools or if applicant was told not to use his own tools. Holding a violation of an employer's instructions or rules as not within the course of employment could "undermine the no-fault foundation of workers' compensation law." (*Westbrooks*, *supra*, 203 Cal.App.3d at p. 254.) In other words, "[w]here an employee is in the performance of the duties of his employer, the fact that the injury was sustained while performing the duty in an unauthorized manner or in violation of instructions or rules of his employer does not make the injury one incurred outside the scope of employment." (*Williams v. Workers' Comp. Appeals Bd.* (1974) 41 Cal.App.3d 937, 940 [39 Cal.Comp.Cases 619].) For example, a bus station security guard's injury was found to be AOE/COE when he was injured while chasing a person disturbing other passengers despite the employment handbook's rule against chasing anyone. (*Zenith Insurance Company v. W.C.A.B.*

(Alex) (2022) 87 Cal.Comp.Cases 973, 979 (writ den.).)[2] The security guard performing "his duties of employment in violation of the employer's instructions or rules did not take him out of the course of the employment." (*Id*.)

Further, the Appeals Board stated in a recent panel decision, when an employee was injured while intoxicated despite the employer's supposed "zero-tolerance" policy towards drinking, "[a]n injured worker who is otherwise in the course of employment does not fall out of the course of employment even if he or she is performing his or her work in an unauthorized manner." (*Hansen v. Freight Handlers* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 141, citing *D. H. Smith Company, Inc. v. Workers' Comp. Appeals Bd. (Martinez)* (2009) 74 Cal.Comp.Cases 1278 (writ den.).) In *Martinez*, injuries suffered by an employee while driving a truck that his employer stated only the employee's son could drive were AOE/COE, when the employee was authorized to travel to work in the truck, although as a passenger rather than driver. (*Id*.) "Applicant was authorized to travel to work in Defendant's truck, and even if the injury occurred while the authorized travel was conducted in an unauthorized manner, it arose out of and occurred in the course of employment." (*Id*. at p. *3.) Similarly, even if applicant using his own tools at work was in violation of the employer's instructions or rules, his injury still occurred AOE/COE.

[2] Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) A California Compensation Cases digest of a "writ denied" case is also not binding precedent. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 [Appeals Bd. en banc].) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Bd. en banc).)

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the March 9, 2023 F&O is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the March 9, 2023 F&O is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 26, 2023

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

ALBERT & MACKENZIE
THE BRIDGEFORD LAW OFFICE
GARY TIMSON

JMR/oo

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