WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

BRIAN BURK, *Applicant*

vs.

SARENS INTERNATIONAL;
ARCH INSURANCE ADMINISTERED BY CHARLES TAYLOR, INC., *Defendants*

Adjudication Number: ADJ13623575
San Jose District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board previously granted reconsideration to further study the factual and legal issues in this case.[1] This is our decision after reconsideration.

Defendant seeks reconsideration of the October 11, 2021, Findings and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that there was California jurisdiction over applicant's claim pursuant to Labor Code[2] section 3600.5(a).

Defendant contends that the WCJ erred in finding that California has jurisdiction over applicant's industrial injury pursuant to section 3600.5(a) because applicant was not "regularly employed" in California.

We have reviewed applicant's Answer. 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. Based on our review of the record, for the reasons discussed below, and for the reasons stated in the WCJ's report, which we adopt and incorporate, it is our decision after reconsideration to affirm the October 11, 2021, F&O.

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[1] Commissioner Lowe, who previously served as a panelist in this matter, no longer serves on the Appeals Board. Another panel member was assigned in her place.

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

FACTS

Applicant claimed that, while employed by defendant as a rigging superintendent, he sustained an industrial injury to his back on January 19, 2016, while bending down to stop oxygen bottles from rolling. (Findings and Order ("F&O"), Finding of Fact ("FF") no. 1.) Applicant was a resident of Nebraska. (F&O, FF no. 3.) The employment contract was made in Nebraska for work in Jamaica. (F&O, FF no. 4.) The injury occurred in Jamaica. (F&O, FF no. 1.) Applicant worked in California at various times while employed by defendant. (F&O, FF no. 5.)

Applicant began working for the employer, then called Riggings International, in 2007. (Minutes of Hearing and Summary of Evidence ("MOH/SOE"), p. 4.) Riggins was later bought by Sarens International. (MOH/SOE, p. 4.) The company supplies cranes and equipment for rigging all over the world. (MOH/SOE, p. 4.)

Applicant lived in Nebraska from 2007 through 2016, and was never a resident of California. (MOH/SOE, p. 4.) Riggings had three locations in California between 2007 and 2016, and then the company moved to Texas. (MOH/SOE, p. 4.) Applicant would travel to the California locations to prepare the defendant's equipment for projects and would stay there for two to four weeks at a time. (MOH/SOE, p. 4.) Applicant stated that he went to California two to three times per year starting in either 2007 or 2008 to 2013. (MOH/SOE, pp. 5-6.) He believed he went to California approximately eight times overall but did not have the exact dates as his job log was stolen. (MOH/SOE, pp. 5-6.) His pay rate was based on California's pay rates. (MOH/SOE, pp. 5-6.) In addition to his pay, he would receive a per diem reimbursement for housing and food while in California. (MOH/SOE, pp. 6-7.)

Defendant's only witness was Rafael Teodoro Boza, regional counsel for the defendant since 2017. (MOH/SOE, p. 8.) Applicant had three supervisors while he worked for defendant. (MOH/SOE, p. 9.) Only one still worked for defendant but was not called as a witness. (MOH/SOE, p. 9.) Boza asked Human Resources (HR) at the company for employment records, pay stubs, and timesheets but HR had changed systems in 2017, so could only provide records for 2018. (MOH/SOE, p. 8.) Boza was therefore unable to find any payroll records or pay stubs but was able to find vendor invoices that showed the applicant's job locations. (MOH/SOE, p. 8; Exs. A & B.) Defendant mainly had California yards from 2007 to 2015, but also had yards in a few other domestic locations as well. (MOH/SOE, p. 9.) According to defendant, applicant worked

in California approximately five times during his employment with defendant. (MOH/SOE, p. 5; Exs. A & B.)

DISCUSSION

Labor Code section 3600.5(a) states

> If an employee who has been hired or is regularly working in the state receives personal injury by accident arising out of and in the course of employment outside of this state, he or she, or his or her dependents, in the case of his or her death, shall be entitled to compensation according to the law of this state.

(Lab. Code, § 3600.5(a).) Thus, when an employee sustains injury outside of California, the employee may still be entitled to California workers' compensation benefits if the employee was hired in California or "regularly working" in California.

Here, there is no disagreement that the employment contract was made in Nebraska. The single issue in dispute is whether applicant was "regularly working in the state" pursuant to section 3600.5(a). The issue of whether an employee was regularly working in California most commonly arises for professional truck drivers, and as discussed further below, in addition to considering how much time an employee spent working in California, the Appeals Board often considered the benefit an employer received by having the employee work in California.[3]

In *Koleaseco, Inc. v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1302 (writ den.), the Appeals Board concluded that the applicants, a husband and wife truck driving team, were "regularly working" in California after they sustained injuries in a motor vehicle accident in Illinois. Both were California residents, and the employer was located in Michigan. (*Id*. at p. 1303.) The applicants were regularly employed in California for several reasons including that they averaged about 50 "runs" per year; 90-96% of their runs were to the West Coast, and 80-85% of the those runs were to California; they spent approximately three to four hours in California for every hour spent in Michigan at the time of the accident; and that they were returning from California at the time of the accident. (*Id*. at p. 1307.) Accordingly, California had a compelling

[3] While it is true that Appeals Board panel decisions are not binding precedent and have no stare decisis effect (*Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal. Comp. Cases 236]), we consider them to the extent we find their reasoning persuasive. Unlike unpublished appellate court opinions, which, pursuant to California Rules of Court, rule 8.1115(a), may not be cited or relied on, except as specified by rule 8.1115(b), Appeals Board panel decisions are citable, even though they have no precedential value. (See *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal. Comp. Cases 145].)

state interest in the case for many reasons, including that the employer had clients in California for whom it picked up items to deliver out of state. (*Id*. at p. 1304.)

In *Rocor Transportation v. Workers' Comp. Appeals Bd. (Ransom)* (2001) 66 Cal.Comp.Cases 1136 (writ den.), the Appeals Board concluded that applicant truck driver, a California resident, was regularly employed when he spent only 9.2% of his time driving trucks for defendant within California. Although that percentage was relatively small, the driver regularly drove for the defendant in the state as California was included in his normal routes. (*Id*.) The significant benefit that defendant received from the driver's work in California implied regular employment in the state. (*Id*. at p. 1138.)

In *Rocor v. Workers' Comp. Appeals Bd. (Hogan)* (1999) 64 Cal.Comp.Cases 1117 (writ den.), the Appeals Board determined that the applicant truck driver, a California resident, had been regularly working in California. He began working for the defendant in March 1997, and was injured unloading a trailer shortly thereafter in late May 1997, in Alabama. (*Id*. at p. 1118.) He worked 46% of his time in California in April 1997, and 43% of his time in May 1997. (*Id*.) The defendant was located in Oklahoma. (*Id*. at p. 1117.) In an analogous situation to the instant case, applicant would be dispatched from California to pick up a load from California to deliver it out of state. (*Id* at p. 1118.) The "applicant provided a significant and meaningful economic benefit to his employer" by picking up items in California and delivering them out of state. (*Id*. at pp. 1118-1119.) Here, applicant in the instant case provided a similar economic benefit to his employer.

In *Dick Simon Trucking Co. v. Workers' Comp. Appeals Bd. (Patti)* (1999) 64 Cal.Comp.Cases 98, 99 (writ den.), the Appeals Board also concluded that the applicant, a California resident, was regularly employed in California when the defendant was located in Utah and in injury occurred in Ohio. Although applicant spent only 10% of his total mileage in California and approximately 15% of his total days in California, his home terminal was in California and he spent more time in California than any other state. (*Id*.)

In *Dick Simon Trucking Co. v. Workers' Comp. Appeals Bd. (Keller)* (1998) 63 Cal.Comp.Cases 1527, the Appeals Board again determined that the applicant was regularly employed in California. (*Id*. at p. 1527.) Defendant had facilities in California and headquarters in Utah. (*Id*.) The applicant was initially assigned a route wholly within California for six months and then was reassigned to a nationwide route. (*Id*. at p 1528.) The applicant was injured in

Pennsylvania and spent approximately 85% of his time working outside of California. (*Id*. at p. 1527.) The majority of applicant's trips originated in California. (*Id*. at p. 1528.) The applicant was regularly employed in California because he lived in California near the California facility, he picked up the loads from that facility for trips around the country, and he then returned to the same facility for another trip. (*Id*.)

In *John Christner Trucking, Inc. v. Workers' Comp. Appeals Bd.* (1997) 62 Cal.Comp.Cases 979 (writ den.), the Appeals Board also concluded that the applicant was regularly employed in California. Applicant was a California resident and the defendant was located in Oklahoma. (*Id*. at p. 979.) Applicant started and ended many of his trips in California. (*Id*. at p. 980.) There was disagreement as to how much time the applicant spent in California; defendant contended he spent 32% to 37% of his time in California while applicant contended that he spent 60% to 91% of his time in state. (*Id*.) The applicant stated that the injury occurred in Oklahoma but he felt pain and went to the hospital in California. (*Id*. at p. 980.) The Appeals Board noted that there is no requirement in section 3600.5 that a majority, or any specific percentage, of an employee's time be spent in the state to be considered regularly working in the state. (*Id*. at p. 980.) The applicant had spent at least 32% of his time working in California; that percentage of his employment supported the finding of regular employment in the state. (*Id*.)

Finally, in *CNA Insurance Co. v. Workers' Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 439 (writ den.), the Appeals Board also concluded that the applicants were regularly employed in California. The applicants were residents of Oregon and sustained injuries in Wisconsin while employed as truck drivers. (*Id*. at p. 439.) Defendant's principal place of business was California. (*Id*. at p. 439.) The applicants were usually dispatched from Oregon and made regular runs to California. (*Id*. at p. 439.) They were regularly employed in California because they had at least as much physical connection to California as to any other state. (*Id*. at p. 440.)

Moreover, with respect to employees other than professional truck drivers, the Appeals Board has also concluded that an employee was regularly working in California. For example, in *Cammack Shows Inc. v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 1122, 1122-1123 (writ den.), the Board found that applicant was regularly employed in California when he performed 75% to 80% of his work in California and was a California resident. Applicant was employed as a ride operator and was injured in Arizona when a wall fell on him. (*Id*. at p.1122.)

The applicant was regularly working in California because of the high percentage of time spent working in California. (*Id*. at p. 1123.)

As relevant to the case herein, cases where the Appeals Board determined that an applicant was not regularly working in California can be distinguished because the applicant only worked in California for a short time, failed to provide enough factual evidence about the applicant's work in California, or failed to show how the applicant's work in California benefitted the employer.

For example, in *Sustarich v. Workers' Comp. Appeals Bd.* (2001) 66 Cal.Comp.Cases 967 (writ den.), the Appeals Board concluded that a flight attendant was not regularly employed in California and therefore California did not have jurisdiction over the case. The applicant was attacked at a hotel in Germany after recently disembarking from working on a flight. (*Id*. at pp. 967-968.) She was not a resident of California and was not hired in California. (*Id*. at pp. 968-969.) Between May 1995, and March 1997, when the industrial injury occurred, she returned to California about once per month. (*Id*. at pp. 968, 969.) However, there was no further evidence of how long she stayed in California each time and no evidence as to what she was doing while in California, and without more, the Appeals Board determined that the applicant was unable to show that returning approximately once per month for a little under two years was sufficient to show that she was "regularly employed" in California. (*Id*. at p. 969.) Additionally, the applicant's parents lived in California, and it was unclear from the record whether she was returning to California for work purposes or to visit her family. (*Id*. at p. 969.) There was no mention of any benefit to the employer from the employee being in California.

Similarly, in *Anderson v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 425 (writ den.), the Appeals Board also determined that the applicant, a driver for various entertainment companies, was not "regularly working" in California, and concluded that there was no California jurisdiction. Applicant began working for the employer in April 1994, and sustained an industrial injury shortly thereafter in Utah in May 1994. (*Id*. at p. 426.) Significantly, the WCJ had found that the applicant was not credible. (*Id*.) Unlike the instant case, the applicant had only been employed for two months, and there was no evidence of how often or how long the applicant worked in California while she was employed by the entertainment company or any evidence of how her work in California benefitted her employer.

In the instant case, applicant provided evidence that he generally worked in California for two to four weeks each time and received per diems for hotels and meals. Defendant's main

facilities were here in California, and applicant came here to prepare equipment for other job locations, and defendant received the benefit of applicant's work in California. The WCJ found applicant's testimony as to how often he worked in California credible and further found that the defendant's evidence corroborated applicant's testimony. (Report, pp. 3-4.) We give the WCJ's credibility determination 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].) We note that employers are generally in a better position to present substantial evidence concerning the location of applicant's employment. (See, e.g., *California Ins. Guar. Ass'n v. Workers' Comp. Appeals Bd.* (2004) 69 Cal. Comp. Cases 1323, 1325-1326 (writ den.)*; Garcia v. Reynolds Packing Co*. (January 31, 2018, ADJ9226212) 2018 Cal. Wrk. Comp. P.D. LEXIS 29, *11-12 ["[D]efendant is more likely to have documentary evidence showing applicant's period of employment, e.g., timesheets, wage records, paystubs, etc."].) Here, defendant failed to produce evidence to rebut applicant's evidence as to employment because it lost the HR records due to a change in systems, and defendant failed to produce the applicant's supervisors to testify; additionally, the applicant's own job logs were stolen. Accordingly, based on the record before us, we conclude that the WCJ correctly determined that applicant regularly worked in California, that California has jurisdiction, and that applicant is thus entitled to claim California workers' compensation benefits, and we will not disturb his decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 11, 2021, F&O is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 21, 2022

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

BRIAN BURK
BUTTS & JOHNSON
SASSANO & FLEISCHER

JMR/*pc*

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