WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT ORTIZ, *Applicant*

vs.

DEPARTMENT OF MOTOR VEHICLES;
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ12703884
Oxnard 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.[1] We now issue our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on May 11, 2021, wherein the WCJ found in pertinent part that applicant's injury did not arise out of or in the course of his employment (AOE/COE).

Applicant contends that his injury is not barred by the going and coming rule and the WCJ erred when he found applicant's injury was not AOE/COE.

We received an answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto.

Based on our review of the record, and as discussed herein, we will rescind the F&O and substitute new findings that applicant sustained injury AOE/COE to his neck, upper back, and

[1] Commissioner Dodd, who previously served as a panelist in this matter is unavailable to participate further. Another panel member was assigned in her place.

lower back and that all other issues are deferred, and we will return the matter to the trial level for further proceedings consistent with this decision.

BACKGROUND

Applicant claimed injury to various body parts on April 22, 2019, while employed by defendant as a sworn peace officer.

The following pertinent background is taken from the Report:

> Applicant was employed as a safety officer for the Department of Motor Vehicles. He is a sworn officer with power to arrest. He carries a weapon on duty. He is expected to carry out these duties when necessary, including during lunches, breaks and off-duty. He has been interrupted during lunches by criminal activity to which he was required to respond at various times while employed with DMV.
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> His pay was the same regardless of whether he took lunch or worked through lunch.
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> On 04/22/2019 applicant went to a Sprouts store to buy his lunch. After the purchase he was hit by a car in the parking lot and injured.
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> (Report, p. 2.)

From May 3, 2019 to February 21, 2020, applicant saw treating spinal surgeon, Alan Moelleken, M.D. (Exhibit 4, Report of Alan Moelleken, M.D., dated May 3, 2019; Exhibit 5, Report of Alan Moelleken, M.D., dated May 31, 2019; Exhibit 6, Report of Alan Moelleken, M.D., dated August 21, 2019; Exhibit 7, Report of Alan Moelleken, M.D., dated November 12, 2019; Exhibit 8, Report of Alan Moelleken, M.D., dated February 21, 2020.) On April 2, 2020, Dr. Moelleken performed surgery on applicant's lumbar and sacral spine. Dr. Moelleken diagnosed applicant with injuries to his neck and back, which, with a reasonable degree of medical probability, Dr. Moelleken attributes to a motor vehicle accident on April 22, 2019. (Exhibit 4, p. 3; Exhibit 5, p. 4; Exhibit 6, p. 4; Exhibit 8, p. 4.)

On August 26, 2020, applicant was evaluated by Robert Shorr, M.D., as a panel Qualified Medical Examiner (PQME) in neurology. (Exhibit 1, report of Robert Shorr, M.D., dated August 26, 2020.) Dr. Shorr examined applicant, took a history, performed neuro-diagnostic studies, and reviewed the medical record, including records from Dr. Moelleken. (Exhibit 1, report of Robert

Shorr, M.D., dated August 26, 2020, pp. 2-24; Exhibit 2, medical records of Community Memorial Hospital and Exhibit 3, records from Spine and Orthopedic Center.)

Dr. Shorr opined that applicant sustained injuries to his neck, upper back, and lower back, which were AOE/COE. Dr. Shorr's report states in pertinent part:

> With reasonable medical probability and according to the medical records, especially the records from Community Memorial Hospital Emergency Room on the date of injury, the claimant did sustain injuries to the neck, upper and lower back, when he was struck by a car during his lunch break while wearing his duty belt, including firearm, baton, and handcuffs. The injury, therefore, appears to be AOE/COE but this may ultimately be a legal question for the trier-of-fact.
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> (Exhibit 1, p. 26.)

On April 6, 2021, the parties proceeded to trial on the sole issue of injury AOE/COE. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 6, 2021, p. 2.) At trial applicant testified as follows:

> He began with DMV as a safety officer in 2005. He is a sworn officer with police power, including the power to arrest.
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> ***
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> During his career, he has taken lunch breaks on his job. During lunch breaks, he has had to use his police power and arrest people numerous times.
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> In Oxnard, he witnessed someone carrying a skateboard over his head trying to strike a woman at a bus stop during Applicant's lunch break. He used his weapon and ordered the person to drop the skateboard, ordered the suspect to the ground, and wrestled with him. He handcuffed him and then alerted Oxnard police and the highway patrol, who both arrived and did a search, finding methamphetamine in the suspect's shoe. Oxnard police put him in their unit and booked him, but he smashed his head against the window and was taken to the emergency room.
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> His lunches have been interrupted, and he has been obligated to respond as a duty other times. He first worked in the Inglewood district office, which is a high population and 18 high crime area. He saw someone screaming and yelling during his lunch break and a guy swinging a cane trying to hit people. He used his weapon and subdued this person and took him into custody. He was mentally ill. He was once driving to lunch. What appeared to be gang members approached his vehicle.
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> In his job, he is a sworn officer 24/7 and can be liable if he fails to respond, even if he is at lunch. He was once at El Pollo Loco in Inglewood standing in line

for lunch. An African-American individual in a corner started hollering in his direction and challenging Applicant to fight. There was a lot of racial tension in that area. The Applicant identified himself as police and sent the man on his way. Things like this happened numerous times.

Frequently, events would occur before his shift even started. He once started his shift and was getting coffee. A presumed gang member approached Applicant, identified himself. The person came toward the Applicant, but Applicant got the man to back off. When he was at Inglewood, he had to get there early and had to cross homeless people sleeping just to get into the station house. He has been accosted by them. Things like that happened every day in the L.A. area but not as much in Ventura.

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He was required to engage if he was present and saw an emergency regardless of whether or not he was at lunch. You cannot turn the switch on or off. On the day he was injured, he went to Sprouts and was hit by a car. If there had been a felony occurring at Sprouts, he would have had to respond to it. He's required to engage at all times and carry a weapon and handcuffs. He is the police for the department and has executed warrants and booked people.

Applicant's supervisor Ricardo Hernandez is a sergeant for the Ventura district office. He testified at trial that he had been an investigator for the Department of Motor Vehicles for 17 years. On occasion, he has engaged suspects during his lunch. If a suspect attempted to rob Sprouts on the day Applicant was injured, the witness would hope that the Applicant would have engaged the suspect. He would hope any of his investigators would respond. (SOE, April 6, 2021 trial, at 6:11-7:12.)

DISCUSSION

To be compensable, an injury must arise out of and occur in the course of employment. (Lab. Code, § 3600.[2]) The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing 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 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 [67 Cal.Comp.Cases 51].) In resolving this issue, we

[2] All future statutory references are to the Labor Code, unless otherwise specified.

are mindful that workers' compensation laws must be "liberally construed" in order to extend "their benefits for the protection of persons injured in the course of their employment." (Lab. Code, §3202.) "It is well settled that 'any reasonable doubt as to the applicability of the going and coming doctrine must be resolved in the employee's favor.'" (*County of Los Angeles v. Workers' Comp. Appeals Bd*. (*Swift*) (1983) 145 Cal.App.3d 418, 421 [48 Cal.Comp.Cases 555]; *Parks v. Workers' Comp. Appeals Bd*. (1983) 33 Cal.3d 585, 593, quoting from *Hinojosa v. Workmen's Comp. Appeals Bd*. (1972) 8 Cal.3d 150, 155-156 [37 Cal.Comp.Cases 734].)

In evaluating whether an injury is AOE/COE, we look to 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." (*Price v. Workers' Comp. Appeals Bd*. (1984) 37 Cal.3d 559, 568 [49 Cal.Comp.Cases 772] (*Price*); *North American Rockwell Corp. v. Workmen's Comp. App. Bd*. (1970) 9 Cal.App.3d 154, 158 (*Saska*) [35 Cal.Comp.Cases 300].)

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] (*LaTourette*).) 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*, *supra*, at p. 645.) An employee is acting within the course of employment when he does those reasonable things which his contract with his employment expressly or impliedly permit him to do. (*LaTourette*, *supra*, at p. 651; *Lockheed Aircraft Corp. v. Industrial Acci. Com*. (1946) 28 Cal.2d 756, 760.) Second, the injury must "arise out of" the employment, "that is, occur by reason of a condition or incident of employment, [however], the injury need not be of a kind anticipated by the employer nor peculiar to the employment in the sense that it would not have occurred elsewhere." (*Employers Mut. Liability Ins. Co. v. Industrial Acci. Com*. (*Gideon*) (1953) 41 Cal.2d 676, 679-680.) "[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, 736 [48 Cal.Comp.Cases 326].)

Acts of the employee for personal comfort and convenience while at work are within the course of employment if they are "'reasonably contemplated by the employment.'" (*Price, supra*, at p. 568, citing *Pacific Indem. Co. v. Ind. Acc. Com*. (1945) 26 Cal.2d 509, 514; *California Casualty Indem. Exchange v. Industrial Acci. Com*. (*Cooper*) (1943) 21 Cal.2d 751, 758; *Saska, supra*, at p. 158.) In making such determination, 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.

Although applicant was engaged in the personal act of getting lunch, he was also serving his employer's interests. Therefore, the injury may be viewed as occurring within the course of employment under the "dual purpose" rule. (*Price, supra*, at p. 569.) Where an "employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly or indirectly could he have been serving his employer." (*Lockheed Aircraft Corp. v. Industrial Acci. Com*. (1946) 28 Cal.2d 756, 758-759; see *Price, supra*.) "It is not indispensable to recovery [] that the employee be rendering service to his employer at the time of the injury. [] The essential prerequisite to compensation is that the danger from which the injury results be one to which he is exposed as an employee in his particular employment." (*California Casualty Indem. Exchange v. Industrial Acci. Com*. (*Duffuss*) (1942) 21 Cal.2d 461, 465-466 [7 Cal.Comp.Cases 305] (citations omitted).)

Here, applicant's supervisor Ricardo Hernandez testified that if someone attempted to rob a store where any of his investigators were shopping, he hopes that they would engage a suspect. (MOH/SOE, p. 7.) Mr. Hernandez and applicant both testified that applicant was required to engage if he saw an emergency regardless of whether or not he was at lunch or off duty. (MOH/SOE, pp. 5-7.) Moreover, applicant testified that he is required to carry a weapon and handcuffs at all times and he can be liable if he fails to respond to a situation, even if he is at lunch. (MOH/SOE, pp. 4-5.) In the past, applicant's lunches have been interrupted numerous times and he has had to use his police power, including arresting people during his lunch. (MOH/SOE, p. 4.)

We now turn to the issue of whether applicant's shopping for lunch at a local grocery store 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.) "Mere deviation by an employee from a strict course of duty does not release the master 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*.

(1954) 129 Cal.App.2d 758, 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*") emphasis added.) Here, leaving the office for lunch was not a deviation, much less a substantial or material deviation.

We are not persuaded by defendant's arguments that applicant's injuries are not compensable because he was not on duty. Defendant argues that exceptions for off-duty peace officers do not apply because, pursuant to Government Code section 5092, applicant was not acting as a peace officer.[3] (Gov. Code, § 50920; Lab. Code, § 3600.2(a).) Defendant also argues that exceptions for off-duty peace officers do not apply because applicant was not performing duties specifically identified in Labor Code section 3600.2.[4]

Here, applicant is a peace officer whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest where there is immediate danger to person or property, or of the escape of the perpetrator of that offense. (Exhibit D, Department of Motor Vehicles Position Duty Statement, effective April 5, 2011 (Duty Statement); Pen. Code § 830.3.) Applicant's Duty Statement includes activities that require an investigator such as applicant to be out in the field.[5] Further, applicant testified that his duties as a police investigator did in fact take him out of the office, including during lunch. (MOH/SOE, p. 4.)

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[3] The term "peace officer" means a sheriff, undersheriff, deputy sheriff, marshal, or deputy marshal of a county or city and county, or a marshal or police officer of a city or town, employed and compensated as such, whether the members are volunteer, partly paid, or fully paid, except those whose principal duties are clerical, such as stenographers, telephone operators, and other workers not engaged in law enforcement operations, or the protection or preservation of life or property, and not under suspension or otherwise lacking in good standing. (Gov. Code, § 50920.)

[4] Whenever any peace officer, as defined in Section 50920 of the Government Code, is injured dies, or is disabled from performing his or her duties as a peace officer by reason of engaging in the apprehension or attempted apprehension of law violators or suspected law violators, or protection or preservation of life or property, or the preservation of the peace, anywhere in this state, including the local jurisdiction in which he or she is employed, but is not at the time acting under the immediate direction of his or her employer, the peace officer ... shall be accorded by the peace officer's employer all of the same benefits ... that the peace officer ... would have received had that peace officer been acting under the immediate direction of his or her employer. Any injury, disability, or death incurred under the circumstances described in this section shall be deemed to have arisen out of and been sustained in the course of employment for purposes of workers' compensation and all other benefits. (Lab. Code, § 3600.2(a).)

[5] Activities including: developing field operation plans and safely executing them; performing undercover assignments and surveillance operations; have independent responsibility to oversee an entire investigative operation or project; independently conduct the most difficult and complex investigations; responding to and handling field office disturbances; keeping the peace; making felony and misdemeanor arrests. (Duty Statement, p. 1.) Working long and unusual hours. (Duty Statement, p. 2.) Working both indoors and outdoors, depending on the situation involved, at any given time. (Duty Statement, p. 4.)

Applicant also testified that he is a police officer 24 hours, seven days a week, so he is essentially always on duty. (Ortiz deposition, October 12, 2020, p. 17.)

The "going and coming rule" generally exempts injuries occurring while an employee is engaged in off-duty travel, such as a local commute en-route to and from a fixed place of business at fixed hours, although numerous exceptions to the going and coming rule exist. (*Hinojosa, supra,* at p. 156; *Park, supra*, at p. 589.) The rationale for this judicially created doctrine is that during an ordinary commute, the employee is not rendering any service for the benefit of the employer. (*City of San Diego v. Workers' Comp. Appeals Bd*. (*Molnar*) (2001) 89 Cal.App.4th 1385 [66 Cal.Comp.Cases 692].) Defendant contends that applicant cannot establish an exception to the going and coming rule because applicant was not wearing a uniform at the time he was injured.[6] (*Garzoli v. Workers' Comp. Appeals Bd*. (1970) 2 Cal.3d 502.) However, in *Garzoli,* the injured worker was a police officer who was expected to render assistance while off-duty. Whether he was wearing his uniform during his commute was not the only fact considered in determining compensability. The chief of police in *Garzoli* testified that he expected off-duty officers to render assistance, whether or not they were armed, because it was a small community and failure to do so would erode confidence in the police department as a whole. (*Garzoli v. Workers' Comp. Appeals Bd*. (1970) 2 Cal.3d 502, 504.) Defendant also contends that applicant's injuries are not compensable because applicant was on an unpaid off-premises lunch break. As discussed above, applicant was expected to render assistance during his lunch breaks and thus was essentially on duty. Thus, based on the facts here, defendant's reliance on *Duncan v. Workers' Comp. Appeals Bd*. (1983) 150 Cal.App.3d 117 is misguided.[7]

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[6] We have carefully considered the authority cited by defendant. Defendant's reliance on *State Lottery Comm'n v. Workers' Comp. Appeals Bd*. (1996) 50 Cal.App.4th 311 and *Garzoli v. Workers' Comp. Appeals Bd*. (1970) 2 Cal.3d 502 is misplaced, as they are factually distinguishable and/or do not further defendant's arguments. Defendant argues where the Court of Appeal found workers' compensation liability for off-duty officers pursuant to *Garzoli* and its progeny, they have done so only where uniformed officers were involved. (*State Lottery Comm'n v. Workers' Comp. Appeals Bd*. (1996) 50 Cal.App.4th 311, 317-318 [61 Cal.Comp.Cases 1134].) However, in *Garzoli*, a police officer's injuries were compensable in part because off-duty officers were expected to render assistance and whether the injured worker was wearing a uniform was not the determining factor.

[7] In *McFadden v. Workers' Comp. Appeals Bd*, the court stated that salaried employee is deemed to be compensated during permissible lunch breaks and injuries sustained during the lunch break are therefore compensable. (*McFadden v. Workers' Comp. Appeals Bd*. (1988) 203 Cal. App. 3d 279, 283 [53 Cal.Comp.Cases 311] [The injured worker was an outside salesman and, as such, he was "free to take lunch (or not) as time and circumstances permitted."].) In *Duncan v. Workers' Comp. Appeals Bd*, the court stated that the distinction between "hourly" and "salaried" employees is not dispositive of whether the applicant sustained an off-premises injury AOE/COE. (*Duncan v. Workers' Comp. Appeals Bd.* (1983) 150 Cal.App.3d 117, 120, fn. 1.)

Turning to whether there is substantial medical evidence of industrial causation, a medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd*. (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687].) Further, medical evidence that industrial causation was reasonably probable, although not certain, constitutes substantial evidence for a finding of injury AOE/COE. (*McAllister v. Workmen's Comp. Appeals Bd*. (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660].) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Worker's Comp. Appeals Bd*. (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

As noted above, having examined applicant and reviewed the extensive medical record, PQME Dr. Shorr opined that, with reasonable medical probability, applicant sustained injuries AOE/COE to his neck and back when he was struck by a car on April 22, 2019. (Exhibit 1, pp. 1-2, 26.) Dr. Shorr explained his analysis and the reasoning for his conclusion that applicant sustained injuries AOE/COE. (Exhibit 1, pp. 25-28.) Dr. Shorr's opinions are framed in terms of reasonable medical probability, are not speculative, and are based on pertinent facts and on an adequate examination and history. (*Id.,* at pp. 1-28.) Thus, his opinions constitute substantial evidence. (*McAllister, supra*; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Additionally, we note that applicant's treating spinal surgeon Dr. Moelleken diagnosed applicant with injuries to his neck and back, which he attributes to the motor vehicle accident on April 22, 2019. (Exhibit 4, p. 3; Exhibit 5, p. 4; Exhibit 6, p. 4; Exhibit 8, p. 4.)

Based on a review of case law and for the reasons discussed herein, the fact that applicant was injured while shopping for his lunch off-premises did not remove him from the course of employment. Based on the facts before us, applicant's injuries are not barred by the going and coming rule. The evidence presented supports a finding that applicant was on duty at the time of his injury.

Accordingly, we rescind the F&O, substitute new findings that applicant sustained injury AOE/COE to his neck, upper back, and lower back and, deferring all other issues, return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on May 11, 2021, is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

Finding 1: Applicant sustained injury arising out of and in the course of employment to his neck, upper back, and lower back.

Finding 2: All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 20, 2021

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

ROBERT ORTIZ
ADAMS, FERRONE & FERRONE
STATE COMPENSATION INSURANCE FUND

JB/abs

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