WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

TIMOTEO MARTINEZ ILDEFONSO (Deceased), ***Applicant***

vs.

MRS. GOOCH'S NATURAL FOOD MARKETS INCORPORATED; ZURICH AMERICAN INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ13070396
Marina del Rey District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion on Decision, which are both adopted and incorporated herein, and for the reasons discussed below, we will deny reconsideration.

Labor Code[1] section 3600 imposes liability on an employer for workers' compensation benefits where its employee sustains an injury "arising out of and in the course of employment." Whether an injury arises out of and in the course of employment requires a two-prong analysis. (*LaTourett v. Workers' Comp. Appeals Bd*. (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].)

First, the injury must arise out of the employment, that is, occur by reason of a condition or incident of employment. (*Employers Mutual Liability Ins. Co. of Wisconsin v. Industrial Acc. Com. (Gideon)* (1953) 41 Cal.2d 676 [18 Cal.Comp.Cases 286, 288].) "[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 [48 Cal.Comp.Cases at page 326].) Second, the injury must occur "in the course of

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

employment," which ordinarily "refers to the time, place, and circumstances under which the injury occurs." (*LaTourett, supra*, 63 Cal.Comp.Cases at p. 256.) 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." (*Ibid*.) An employee necessarily acts within the "course of employment" when "performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied." (*Maher, supra*, 33 Cal.3d at p. 733.) Whether an employee's injury arose out of and in the course of employment (AOE/COE) 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].)

"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]; *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd (Makaeff)* (1977) 69 Cal.App.3d 170, 176 [42 Cal.Comp.Cases 297]; *Vogt v. Herron Construction* (2011) 200 Cal. App.4th 643.) "[A]cts necessary to the life, comfort and convenience of the servant 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." (*Price, supra*, 37 Cal.3d at 567–68 (citations omitted).) Thus, even if an employee is 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. This principle holds especially true in cases where the applicant is being paid during the time involved. (*Western Greyhound Lines v. Industrial Acc. Com. (Brooks)* (1964) 225 Cal.App.2d 517; *Rankin v. Workmen's Comp. Appeals Bd*. (1971) 17 Cal.App.3d 857.)

For the reasons stated by the WCJ in the Report and Opinion on Decision, we agree that applicant met the initial burden of proof that decedent's injury occurred AOE/COE. (Lab. Code, § 5705.) We agree that leaving the employer's premises during an unrestricted paid break was an act of 'personal convenience' that was 'reasonably contemplated by the employment' and, therefore, within the course of employment. The burden then shifted to defendant to rebut applicant's evidence or establish an affirmative defense. Defendant did not raise the affirmative defense of intoxication at trial. Moreover, defendant did not establish that decedent was drinking

alcohol at all during his break nor that decedent was drinking alcohol to a degree that would make the personal comfort doctrine inapplicable.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 12, 2021

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

MARTHA EVE JIMENEZ
LAW OFFICE OF DAVID FELDMAN
RTGR LAW

PAG/abs

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

REPORT AND RECOMMNEDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1.	Applicant's Occupation	:	Cook
	Applicant's Age	:	43
	Date of Injury	:	11/16/2019
	Parts of Body Injured/Claimed:		Head and Death
2.	Identity of Petitioner	:	**DEFENDANT** filed the Petition
	Timeliness	:	The petition is timely.
	Verification	:	The petition is verified.
3.	Date of Findings of Fact	:	5/25/2021

Petitioner's contention: Defendant contends that the WCJ's finding that the personal comfort doctrine applies is not supported by the factual evidence, statute or case law; That the finding that the decedent was within the personal comfort doctrine is not justified because the decedent's actions were not impliedly authorized or reasonably contemplated by his employer when he left the premises to visit a friend and/or check on his son, and returned to the store well after his 15 minute break had ended; and that the WCJ's conclusions are not justified because of decedent's actions were not reasonably contemplated by his employment under *Price v. WCAB* and the WCJ failed to address *Price* or other relevant case law in the Opinion on Decision or Findings of Fact. This WCJ disagrees.

II
FACTS:

The facts in this case were derived entirely from the numerous exhibits that were jointly submitted by the parties and admitted into evidence. By stipulation of the parties there was no testimonial evidence offered by either side. All references to testimony in this Report and Recommendation on Reconsideration refer to deposition testimony.

The only " facts" that all can agree on is that the decedent went on his last 15 minute break at approximately 9:09 PM on 11/15/2019 and on his return to the store he was struck while crossing the street, in the cross walk, by a car and injured. The decedent and the driver of the car had a conversation and he returned to the store at approximately 9:35 PM, some 11 minutes late from his 15 minute break.

The court does not consider this to be "well after his 15 minute break had ended "as indicated by the petitioner. (See Petition for Reconsideration at page 2 lines 6-7). Although the court may never know exactly what the decedent did or where he went on that break, we do know what he told his wife and employer. He either went across the street to a restaurant to meet a friend or went home to check on his sick son. There is not a scintilla of evidence that has been introduced in this case to prove that the decedent had consumed any alcohol on his last 15 minute break on 11/15/2019.

Petitioner's "Summary of Material Facts" are mostly correct, but somewhat misleading. The fact that co-worker Mr. Mora knew the decedent would frequently drink alcohol on his breaks at a bar or restaurant within walking distance from the store does not prove what the decedent did or did not do on that 15 minute break on 11/15/2019. (See Petition for Reconsideration at page 2 lines 23-25). The same is true for the Statement of Material Facts which indicated that Mr. Luis (Louie) Tanchez smelled a "faint presence of alcohol" on the decedent (See Petition for Reconsideration at page 3 line 21). In fact, Mr. Tanchez testified that he did not smell alcohol on the decedent when he returned from his last 15 minute break after being struck by the car. (See Joint Exhibit MM at page 115 lines 13-16). Mr. Tanchez specifically asked the decedent if he was drinking and the decedent replied "no". (See Joint Exhibit MM at page 115 lines 19-25 and page 116 lines 1-9.)

The court is disturbed by the Summary of Material Facts that indicated that the police report from LAPD notes that LAFD noticed that the decedent had a high BAC while transporting him to the hospital from his home later that evening. (See Petition for Reconsideration at page 4 lines 3-5). Although this is a correct note from the LAPD Police Report (See Joint Exhibit RR at page 8 under "Remarks"). This "remark" is not supported by the evidence. A review of the LAFD Pre Hospital Report Summary makes no mention of any such comment or anything related to a BAC or alcohol levels when they arrived at the decedents home on 11/15/2019. (See Joint Exhibit QQ pages 15-19). Additionally, the comment in the Statement of Material Facts that that decedent's wife testified that the decedent did not seem well when she saw him at home and thought he was drunk is also misleading (See Petition for Reconsideration at page 3 lines 25-26). The decedent's widow testified that when she first saw her husband at home that night he stumbled and fell and she thought he was drunk and he seemed confused (See Joint Exhibit NN at page 16 lines 21- 25 and page 17 lines 1-2). In fact, the decedent's widow testified that he usually did not come home from work drunk and that he did not usually drink while on his breaks at work. (See Joint Exhibit NN at page 17 lines 3-7). The decedent's widow testified that the decedent told her that he was at Casa Blanca (a restaurant across the street from his place of employment) to visit a friend and on his way back to work he had been hit by a car. (See Joint Exhibit NN at page 19 lines 4-14). She went on to testify that the decedent seemed confused and that she was confused because he did not drink at work. (See Joint Exhibit NN at page 20 lines 24-25 and page 21 lines 1-4.). The widow further testified that the decedent told her that he did not have a drink at Casa Blanca and that she did not smell alcohol on him. (See Joint Exhibit NN at page 21 lines 15-19). It is certainly reasonable to conclude that the decedent appeared confused and stumbled and fell due to the golf ball size hematoma on his head from being struck by the car as noted by the paramedics when they arrived at the decedent's home after the widow called 911. (See Joint Exhibit QQ at page 19)

The "material facts" of this case are that the decedent was on his 15 minute break at work as a cook for Whole Foods when he either went across the street to the restaurant Casa Blanca to see a friend or went home to check on his sick son as he told the employer. On his way back to work from that 15 minute break he was struck by a car while in the cross walk. The petitioner's position is that the decedent drank alcohol on that 15 minute break and that the personal comfort doctrine does not apply.

III
DISCUSSION:
THE PERSONAL COMFORT DOCTRINE

The original justification for the personal comfort doctrine was that the employer actually benefited from the activity. The employee, by engaging in personal activity during working hours, was often in a better position to work, thus benefiting the overall effort. Such acts are 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. (*Whitting-Mead Commercial v. IAC (1918) 178 Cal.505, 507*). The California Supreme Court has stated that "the course of employment is not considered broken by certain acts related to the personal comfort of the employee, as such acts are helpful to the employer in that they aid in the efficient performance by the employee". (*See SCIF v. WCAB (Cardoza) (1967) 32 CCC 525, 527*). The courts have noted that injury sustained during acts of personal comfort are compensable because they are a normal human response in a particular situation. (See *North American Rockwell Corp. Space Division v. WCAB (Saksa) (1970) 35 CCC 300, 303*). The California Supreme Court confirmed that although a strong nexus between the personal act and increased efficiency is not a prerequisite to coverage, the court stated that "acts of personal comfort are within the course of employment if they are reasonably contemplated by the employment".(*See Price v. WCAB (1984) 37 Cal. 3rd 559, 658*). The court in *Price* noted that "because of the policy favoring employee compensation, doubts about whether an act is reasonably contemplated by the employer are resolved in favor of the employee". (*See Price v. WCAB (1984) 37 Cal. 3rd 559, 568*).

In the case at issue herein, it is the court's opinion that whether the decedent went home to check on his sick son or went across the street to the restaurant to meet a friend, the act falls within the personal comfort doctrine. The employer Whole Foods did not have a policy that prevented the decedent from leaving the premises on his break. Ms. Angela Montoya, the decedent's supervisor, testified that there are no restrictions during the 15 minute break only to be back in 15 minutes and let someone know if you're leaving the floor. (See Joint Exhibit LL at page 18 line 14). The decedent did in fact, so notify Ms. Montoya (See Joint Exhibit LL at page 18 lines 20-24). Ms. Montoya testified that the employees are not restricted in any way during the 15 minute break and some of the employees do leave the premises, including herself who sometimes goes to sit in her car or goes down the street to the bank on her 15 minute break (See Joint Exhibit LL at page 25 lines 21-25 and page 26 lines 1-8.). Therefore, in this case, it was reasonably contemplated that an employee, like the decedent, could leave the premises during his 15 minute break and cross the street, or go home to check on his sick son as the decedent only lived approximately 1 mile from the place of employment, to get away from the job for a short period of time, then to return to work and resume his duties. There is no evidence of any kind that could prove that the decedent consumed alcohol on that 15 minute break, which is against company policy and might have made the personal comfort doctrine inapplicable.

There is no dispute that the decedent was struck by the car on his 15 minute break off the premises of the employer. The personal comfort doctrine is not limited to acts performed on the employers' premises. Again, the question is was the activity "reasonably contemplated by the employment". The courts have held that an employee injured while crossing the street during a paid break was acting for personal comfort and entitled to compensation. (*See Toohey v. WCAB (1973) 38 CCC*

309 See also Universal City Studios, Inc. v. WCAB (*Hamilton, Johnson*) (*1974 44 CCC 155*). In *Toohey* the court stated at page 312 "…the evidence is that the acts of Toohey, although not encouraged, would be tolerated. Under the construction in favor of the employee, we find that the injury was incurred during the course of the employment and is compensable". As in *Toohey*, the employer in the case at issue tolerated employees leaving the premises on their 15 minute break, as indicated above per Ms. Montoya, there was no policy prohibiting the employees, like the decedent, from leaving the premises on their 15 minute break and the employer was aware that employees did leave the premises on their 15 minute break and Ms. Montoya also occasionally left the premises on her 15 minute break.

Based on the above, the court finds that the decedent's activity was reasonably contemplated by the employer and therefore the personal comfort doctrine applies.

BURDEN OF PROOF AND PREPONDERANCE OF THE EVIDENCE

According to Evidence Code Section 115. The "burden of proof" is the "obligation of a party to establish by a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. In most cases workers' compensation cases, the burden rests with the employee to prove his or her claim in all of its parts. (*See Hercules Power Co. v. IAC (Neyman*) (*1933*) *131 Cal. App. 587, 593*). The employee has the initial burden of proving that the injury or death arose out of and in the course of employment. (*See LaTourette v. WCAB* (*1998*) *63 CCC253, 255 and Rogers v. WCAB* (*1985*) *50 CCC550, 553*).

The Petition for Reconsideration correctly cites Labor Code Section 3202.5 that state that "**all parties** (emphasis added) shall meet the evidentiary burden of proof by a preponderance of the evidence, which means that evidence when weighted with that opposed to it, has more convincing force and greater probability of truth". In the case at issue herein, it is the court's opinion that the applicant/decedent has met that burden of proof per the facts and the law as noted above. The Petition for Reconsideration incorrectly stated that this WCJ based his finding solely on whether the decedent consumed alcohol on his break to the level of intoxication. (See Petition for Reconsideration at page 5 lines 26-27). The Opinion on Decision indicated that "it is clear from the evidence presented that the employer sanctioned the applicant's last 15 minute break, and that there is no direct evidence that the applicant used that break to consume alcohol….the court finds that the personal comfort doctrine does apply…" (See Opinion on Decision dated 5/25/2021 at page 2). The court did not base its opinion on whether or not the decedent was intoxicated. The petitioner states that the "relevant issue is whether he (decedent) was drinking at all" so that "even one sip of alcohol would be in violation of company policy and outside the personal comfort doctrine". (See Petition for Reconsideration at page 6 lines 11). Once the employee has established the requisite elements of his or her claim, the burden of proof shifts to the defendant. It is the court's opinion that the defendant did not prove by a preponderance of the evidence that the decedent had consumed any alcohol on that 15 minute break or that the decedent's activities on that break were not reasonably contemplated by the employer (See above discussion of the personal comfort doctrine). It is the court's opinion that the defendant did not meet its burden of proof on this issue as there is no evidence that the decedent consumed any alcohol on that break. As indicated above Mr. Tanchez did not smell alcohol on the decedent but the Petition for Reconsideration noted that Mr. Lorenzo Velasquez smelled a "faint presence of alcohol. Even if this was correct, it does not support that the applicant/decedent likely had at least one drink at

Casablanca. ” (See Petition for Reconsideration at page 6 lines 17-21). The fact is that per Mr. Velasquez actual deposition testimony he was not even 100% sure that what he smelled was alcohol. (See Joint Exhibit MM at page 86 lines 5-16)

IV
RECOMMENDATION:

For the reasons stated above, it is respectfully recommended that defendant’s Petition for Reconsideration be denied.

DATED: 06/21/2021

HON. ELLIOT F. BORSKA
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT CAUSING DEATH/PERSONAL COMFORT DOCTRINE

The applicant, Timoteo Martinez Ildefonso, was struck by a car on 11/15/2019 on his 15 minute break from his work at the Venice location of Whole Foods Market/Mrs. Gooch's Natural Foods and died from his injuries later that day. There is no direct evidence presented that can determine with any certainty that the applicant was consuming alcohol on that break so that the personal comfort doctrine does not apply. As such, the court finds that the personal comfort doctrine does apply, and that the applicant did sustain an injury in the course and scope of his employment that caused his death.

Although the Declaration of Diego Mora indicated that the applicant asked him on the date of the injury if he would like to go get a drink on his last break (See Joint Exhibit DD) as Mr. Mora declined, there is no evidence that the applicant actually went for a drink on his last break that night. It is clear from the evidence presented that there was no policy of the employer that the applicant had to stay on the premises of his employment on his break. Per company policy, the applicant requested permission to take that last break that night. (See Joint Exhibit HH and LL). The evidence presented indicated that the applicant told several co-workers and supervisors, after he was hit by the car and returned to work, that he went home on his break that night to check on his sick son. (See Joint Exhibit II, KK, and MM). Per the evidence presented, intoxication was ruled out when the applicant returned to work that night after being struck by the car. (See Joint Exhibit MM at Page 90 lines 14-18.). In addition, when co-worker Mr. Tanchez spoke to the applicant after he was struck by the car and returned to work, he did not smell alcohol. (See Joint Exhibit KK at Page 115 lines 6-16).

The applicant's wife in her deposition did confirm that their eldest son had been sick for a few days as of the day of the accident (See Joint Exhibit NN at Page 15 lines 9-11). She testified in deposition that the applicant usually did not drink at work (See Joint Exhibit NN at Page 17 lines 5-7). She testified that the applicant, after he got home from work after being hit by the car, seemed confused, and he told her that he had been to Casa Blanca to visit a friend on his break and was hit by the car on his way back to work. (See Joint Exhibit NN at Page 19 liens 4-14). She testified that the applicant did not say he had a drink at Casa Blanca and that she did not smell alcohol on her husband at that time. (See Joint Exhibit NN at Page 19 liens 15-19).

It has long been established that in a workers compensation context, under the personal comfort doctrine, a worker remains in the course and scope of his employment during personal comfort activities that are sanctioned by the employer and are incidental to, but not directly involved in, the performance of the appointed task. Off premises activities that have been found to be within the course and scope of employment under the personal comfort doctrine include crossing the street on a break to buy a drink. (See Halfman v. State Accident Ins. Fund 618 P.2nd 1294 (1980).

In the case at issue herein, it is clear from the evidence presented that the employer sanctioned the applicant's last 15 minute break, and there is no direct evidence that the applicant used that break to consume alcohol. There were no restriction on the applicant during his break and that the employees are free to do whatever they want during their 15 minute break within company policy.

Therefore, the court finds that the personal comfort doctrine does apply and that the applicant was in the course and scope of his employment when he was struck by the car, in close proximity to his place of employment, which caused his death later that evening.

Date: 5/25/2021

Elliot F. Borska
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE