WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

STEVEN PACATTE (Deceased), ***Applicant***

vs.

SAN FRANCISCO FIRE DEPARTMENT, CITY AND COUNTY OF SAN FRANCISCO, Permissibly Self-Insured, ***Defendants***

Adjudication Number: ADJ12113500
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant has filed a Petition for Reconsideration regarding the May 13, 2021 Findings of Fact issued by the workers' compensation administrative law judge (WCJ). Based on our review of the record, and for the reasons stated in the WCJ's Opinion on Decision, which we adopt and incorporate as quoted below, we will deny reconsideration.

In his Opinion on Decision, the WCJ stated:

RELEVANT FACTS

> The Applicant, Steven Pacatte, alleges injury resulting in Death occurred on December 12, 2018, while employed by the City and County of San Francisco. At the time of the Applicant's death the employer was permissibly self-insured.
>
> The Parties submitted the San Francisco Fire Department Clothing and Personal Protective Equipment Distribution Policy. (Joint Exhibit 4.) While generally the Department is responsible for providing such equipment, "a lack of reasonable care on the part of the member resulting in damages or lost uniforms or PPE will require monetary reimbursement to the Department. Example of lack of reasonable care may include, but not be limited to: Failure to store clothing and/or PPE and secure lockers properly when going off duty with a subsequent loss or damage; any articles stolen from personal vehicles while not at work not on SFFD property." (Id. at 10-11.) The parties similarly submitted the Fire Department's Memorandum of Understanding, which contains no reference to the nature of roll call, uniform retention, or reporting requirement. (Joint Exhibit 5.)

The San Francisco Fire Department issued a General Order on October 30, 2006 regarding Roll Call. The General Order designated that 0800 shall be the time for conducting roll call and that "at roll call, the Senior Officer shall assign and post the watches, review the Fire Calendar for pertinent details and or assignment that affect their company…" (Joint Exhibit 2, Page 3.) Individual firefighters are instructed that "when a member is notified that they are due for a long detail, they shall immediately assemble their equipment, both personal and Department issued, needed for such detail. Upon notification of the location, the detailed member shall promptly leave for the detail in appropriate uniform attire." (Id. at 6.)

On December 12, 2018 the Applicant was driving eastbound on Occidental Road when he was involved in a vehicle collision causing his death. (Joint Exhibit 6.) A victim of the accident reported to the police that she was "driving west on Occidental Road at the speed limit. Suddenly, she observed a vehicle pass a truck coming the opposite direction. The passing vehicle hit her head on." (Id. at 16.) Another victim testified that while driving "the truck behind him [Applicant's truck] began to pass right when a Suburban was coming the other direction. [The witness] estimated the truck was driving 50 mph but wasn't sure how fast the Suburban was going. After the impact, the truck hit the left side of his garbage truck and almost tipped it over." (Id. at 17.) The police officer investigating the incident concluded the Applicant "caused this traffic collision by driving in violation of 21751 VC…" (Id. at 20.) A death certificate was issued for the Applicant on December 20, 2018, listing the cause of death on December 12, 2018 as "Pending Investigation." (Joint Exhibit 9.)

The parties had three witnesses appear at trial via LifeSize Cloud. Retired Lieutenant Annie Hodinott testified on behalf of the Applicant. Ms. Hodinott describe the process of scheduling replacements appropriate to address needs of each firehouse and testified that a firefighter could be called to another fire station on any given work day and would receive notice the day of their shift. Ms. Hodinott confirmed that firefighters can regularly be called to another station far away from their home station and would be responsible for moving all of their gear. Ms. Hodinott testified that it is the norm for people to use their own private vehicles when going between fire stations on reassignment. (Minutes of Hearing and Summary of Evidence, Sept. 24, 2020, Page 7, Ln. 6.) Ms. Hodinott confirmed she found no evidence the Applicant was actually scheduled to be assigned to a different firehouse than his normal station on the day of his death.

The Applicant called Joseph Moriarty as their second witness. Mr. Moriarty testified that he previously served as an Acting Battalion Chief and provided extensive testimony regarding the exhibits submitted documenting the Applicant's prior changes to other firehouses. However, on the second day of trial, Mr. Moriarty confirmed the Applicant had never been assigned out since being stationed permanently at Station 14.

The [sic] finally presented Captain Robert Neuneker. Captain Neuneker confirmed the Applicant was not scheduled to have his shift changed on the date of injury, that no one was assigned out from Station 14 on the Applicant's date of injury, that there were no wildfire assignments, and that had the Applicant not suffered his injury there is no reason to conclude he would have been assigned out from Station 14 on the date of his injury.

The parties submitted numerous exhibits documenting the Applicant's work history. (See: Joint Exhibits 1, 3, 12, 13, 14, 15, 16, and 17.) In summary, these exhibits demonstrate the Applicant regularly volunteered for disaster service throughout his assignments – including up through the date of his death – was detailed out to other fire stations throughout his career, but had not been detailed out since being permanent assigned as a driver in either February or March of 2018.

The Applicant bears the burden of proving an injury arises out of and in the course of employment. The undersigned evaluates the compensability of injury guided by the "fundamental principle that the requirement [of evaluating injury AOE/COE] is to be liberally construed in favor of awarding benefits." (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal. 3d 729, 732-733 [190 Cal. Rptr. 904, 661 P.2d 1058], fn. omitted, original italics.)" *Latourette v. Workers' Comp. Appeals Bd*., 17 Cal. 4th 644, 651.

1) <u>The Applicant's injury "arose out of" the events of December 12, 2018</u>.

A finding of injury arising out of employment in the present case depends upon whether the Applicant was on a "special activity" that occurred in the course of employment. The Applicant's burden to prove an injury "arose out of the employment" requires the demonstration of a causal relationship between Applicant's activities and the medical condition found. *Head Drilling Co. v. Industrial. Acci. Com*. (1918) 177 Cal. 194, 197. The police report filed regarding the automotive accident demonstrates the Applicant's death was as a result of the automotive accident that occurred while the Applicant commuted in to work. (Joint Exhibit 6.) Whether such activities are compensable depends upon whether the Applicant was engaged "in a special activity that is within the course of employment . . ." *Latourette v. Workers' Comp. Appeals Bd*., 17 Cal. 4th 644, 652. As such, the Applicant has met his burden of proving the injury to the right knee arose out of the events of June 8, 2017, but a finding of compensability depends on whether the events of December 12, 2018 were a "special activity" that occurred in the course of employment.

2) <u>The events of December 12, 2018 and the Applicant's injury falls within an exception to the going and coming rule and is found to have occurred in the course of employment</u>.

The compensability of the Applicant's claim depends on whether the Applicant's commute falls within one of two circumstances described in the *Hinjosa* case. It is without question that an employee's claim for benefits is barred by the going and coming rule when injured during a commute and not required to travel beyond their work site. *California Casualty Indemnity Exchange v. IAC (Cooper)* (1943) 8 CCC 55. The Supreme Court has clarified this standard and distinguished between two distinct circumstances that result in different findings on compensability. See: *Hinojosa v. WCAB* (1972) 37 CCC 734. The Court described the following scenarios:

> The decisions have thereby excluded the ordinary, local commute that marks the daily transit of the mass of workers to and from their jobs; the employment, there, plays no special role in the requisites of portage except the normal need of the presence of the person for the performance of the work.
>
> On the other hand, many situations do not involve local commutes [en route] to fixed places of business at fixed hours. These are the extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or use of a car, for some particular reason of his own. When the employer gains that kind of a particular advantage, the job does more than call for routine transport to it; it plays a different role, bestowing a special benefit upon the employer by reason of the extraordinary circumstances. The employer's special request, his imposition of an unusual condition, removes the transit from the employee's choice or convenience and places it within the ambit of the employer's choice or convenience, restoring the employer-employee relationship.
> (Id.)

While the first scenario is clear and would result in a finding of non-industrial causation, the second has been the area of significant litigation and further distinction. The present matter clearly falls within the going and coming rule. Evaluating which of the circumstances described in *Hinojosa* applies to the present matter is the sole question to be decided. To evaluate such circumstances, the California Supreme Court has directed "In determining whether the going and coming rule bars compensation in a particular case, the courts must abide by the mandate of Labor Code section 3202, which provides that the Act 'shall be liberally construed' to protect the injured. Any doubts as to the rule's application are to be resolved in favor of coverage." *Price v. WCAB* (1984) 37 Cal. 3d 559, 565 (citations omitted).

The special activity exception may result in findings of injury arising out of and in the course of employment for activities that do not involve an explicit request by the employer and which would otherwise be excluded from compensability under Labor Code 3600. An injured employee must prove an injury occurred

while performing "those reasonable things which his contract with his employment expressly or impliedly permits him to do." *Maher v. Workers' Compensation Appeals Board* (1983), 48 Cal. Comp. Cases 326, 328. Activities and travel outside of the normal work activities are generally excluded from compensability, and would – if not subject to an exception – result in the Applicant taking nothing. However, the "special activity" exception to this rule found within *Latourette, supra*, permits a finding of compensability if the Applicant can prove that at the time of injury he was engaged in "a mission which incidentally or indirectly [contributes] to the service and benefit of the employer'" (*Dimmig v. Workers' Comp. Appeals Bd*., 6 Cal. 3d 860, 868) and that the activity was undertaken at the "request or invitation by the employer, either express or implied." (*C. L. Pharris Sand & Gravel v. Workers' Comp. Appeals Bd.*, 138 Cal. App. 3d 584, 591)

The benefit to the employer must be weighed against the nature of the invitation from the employer. The Defendant appropriately cites to and discusses *City of Los Angeles v. Workers' Compensation Appeals Board* 157 Cal. App. 4th 78. The Court of Appeals in *City of Los Angeles* evaluated the special activity exception's requirements before concluding "[t]he court [in *C.L. Pharris*, supra,] reasoned if employer benefit alone were sufficient to invoke the special errand exception, there would be no need for the additional requirement that the special activity must have been undertaken at the request or invitation of the employer." *City of Los Angeles v. Workers' Comp. Appeals Bd*., 157 Cal. App. 4th 78, 86. The Court in *City of Los Angeles* failed to note in their decision that the court in *C.L. Pharris* weighed the balance between employer benefit and the level of express or implied invitation before concluding "[n]o doubt there may be cases in which the benefit to the employer is so direct and substantial and the other circumstances such that, notwithstanding the absence of an express request or invitation the employee undertake the mission or errand, an implied request or invitation may be found. (*Dimmig v. Workmen's Comp. Appeals Bd., supra*, 6 Cal.3d at pp. 863, 865-866, 869.)" *C. L. Pharris Sand & Gravel v. Workers' Comp. Appeals Bd.*, 138 Cal. App. 3d 584, 593. This holding and its interpretation supports the conclusion that the weighing of evidence must be evaluated in a favorable light to the Applicant in order to fulfil the liberal construction rule required under Labor Code section 3202.

In applying the balancing test the undersigned concludes the Applicant having access to his vehicle provides a clear benefit to the employer and occurred with the employer's implicit consent, both of which place this injury within the exception to the going and coming rule. The employer here has never made an explicit request that its employees have access to a car in order to perform their job duties. Nevertheless, the employer receives a clear benefit from its employees having access to cars. As Chief Neuneker testified, firefighters can only learn of the need to travel once at the job-site; such lack of advanced notice necessitates firefighters be capable of travel between locations. While the Defendant asserts travel by bicycle or public transit is an available means of

transportation that subverts the exception to the going and coming rule, that an individual can take alternative transportation does not alter the City and County's requirement that its firefighters travel between locations and have some available means to complete such travel. As discussed above, while not necessary for employees to drive a vehicle, it is unquestionably of benefit to the employer to have firefighters arrive more quickly and prevent the engine they are assigned to from being deemed inactive, or "55" as Captain Neuneker put it. Should additional delays occur because an individual does not take a car, it will place additional stress upon the system and result in a loss of service to the citizens of the City and County of San Francisco. Further, Captain Neuneker testified that should a firefighter take too long to arrive at their reassigned location, they would be questioned about the cause of the delay. Such questioning further demonstrates that the need for speedy transportation between fire houses is impliedly required; the City and County's failure to provide vehicles for this task makes clear that individual employees will require their vehicles to accomplish this task in a speedy manner and prevent the closure of firehouses due to understaffing.

The analysis here is limited to the facts of this case. Captain Neuneker cited to a number of firefighters who take public transit, bicycle, and use taxis both to arrive at work as evidence of the employer's lack of agreement and assent to employees driving their cars in. While the undersigned notes without concluding that these employees may not be subject to the same exception to the going and coming rule found here, the employer nevertheless receives some significant benefit from employees having their vehicles on premises to transport themselves between job sites when reassigned. Similarly, the public benefit to having open firehouses capable of responding to emergencies – which they may not be able to do with firefighters who are unable to arrive on time – weighs to the Applicant's favor pursuant to *Price v. WCAB, supra*.

The finding of compensability is consistent with prior holdings of the Board. In a case in which the Board noted "in relevant part that Defendant's owner testified that it was not unusual for an employee to leave one job site and go to another within the same work day, that other testimony indicated that such travel within the same day was rare, but that, even if such travel were rare, if the travel was required, the Hinojosa exception could apply." *Winkleblack Constr., California Ins. Co. v. Workers' Compensation Appeals Bd.*, 75 Cal. Comp. Cases 1300, 1301-1302. (Cal. App. 6th Dist. October 25, 2010) As in *Winkleblack*, while the Applicant's being required to travel was rare, it nevertheless can be required by the City and County of San Francisco of firefighters. On this basis, the undersigned concludes the Applicant's injury falls within an exception to the going and coming rule.

The nature of the public benefit provided through the workers' compensation system mitigates the applicability of the decision relied upon by the Defendant. The Defendant cites to *Newland v. City of Los Angeles*, 24 Cal. App. 676, for

the proposition that the injured worker must demonstrate that the benefit to the employer existed on the actual date of injury; specifically, the Defendant contends the Applicant must show he actually would have needed his car on the date of injury to qualify under this exception to the going and coming rule. See: Defendant Post-Trial Brief, Page 6. While generally appropriate in a case involving respondeat superior, as the Court of Appeals was evaluating in Newland, this holding is of limited relevance and stands in direct contrast to the holdings of the Board and Courts of Appeal when evaluating the exception to the going and coming rule in the workers' compensation forum. The Court of Appeals recognized as much in *Newland*, stating explicitly

> The test for liability under workers' compensation law, which requires finding "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" (Lab. Code, § 3600, subd. (a)(2)) is not identical to the test for liability under the respondeat superior doctrine based on "scope of employment." (*Hinman, supra*, 2 Cal.3d at p. 962, fn. 3.) The tests are closely related, because they both consider the benefit to the employer and the allocation of risk for industrial injuries. (Ibid.) Workers' compensation provisions are construed liberally, however, to protect employees, and courts have been generous in finding injured workers entitled to benefits. (*Jorge, supra*, 3 Cal.App.5th at pp. 398–399, fn. 7.) Although California courts look to workers' compensation cases for guidance, the scope of employment for imposing vicarious liability is more restrictive in tort claims based on the differing policy considerations. (Ibid.)
> *Newland v. County of Los Angeles*, 24 Cal. App. 5th 676, 688-689

Reading the exception to the going and coming rule in a broader manner than is in *Newland* is consistent with Labor Code section 3202. The holding in *Winkleblack, supra*, demonstrates the more liberal standard to be considered when determining liability under the workers compensation provisions of the Labor Code that meets the policy considerations before the Workers' Compensation Appeals Board. As a result holding in *Newland* is of limited relevance in the holding here.

For the foregoing reasons, the Applicant's claim of injury is found to be within the exception to the going and coming rule and is therefore found to be arising out of and in the course of employment. All other issues in the matter are deferred with Board jurisdiction reserved.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 16, 2021

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

COLLEEN BIALAS, GUARDIAN AD LITEM
JONES CLIFFORD
OFFICE OF THE CITY ATTORNEY

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