WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA FLORES, *Applicant*

vs.

PINNACLE HEALTH CORP.; SUMMARY OF EVIDENCE INSURANCE COMPANY OF THE WEST; AFFINITY HOME HEALTH CARE SERVICES, insured by FALLS LAKE FIRE & CASUALTY INSURANCE and administered by SEDGWICK CMS; HOME HEALTH CARE SOLUTIONS, INC., insured by FALLS LAKE FIRE & CASUALTY INSURANCE and administered by SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ10954204
Pomona District Office

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 15, 2022

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

MARIA FLORES
LAW OFFICES OF RICHARD D. WOOLEY
PARK, GUENTHART
SAMUELSEN, GONZALEZ, VALENZUELA & BROWN, LLP

AS/ara

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

REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Applicant's Occupation: LVN
Applicant is Age:
Date of Injury: spine, left thigh, left knee, left ankle
Alleged Parts of Body Injured: head (deferred)
Manner in which injury occurred: car accident

2. Identity of Petitioner: Defendant Home Health Care Solutions; Falls Lake Insurance Administered by Sedgwick

Timeliness: timely
Verification: verified

3. Date of Issuance of Order: July 8, 2022

4. Petitioner's Contentions:

Contention 1. "HOME HEALTH CARE SOLUTIONS NO LONGER RECEIVED ANY BENEFITS FROM THE APPLICANT AFTER THE APPLICANT LEFT THEIR PATIENT AND BEGAN TO TRAVEL TO A PATIENT WHOM SHE SAW THROUGH HER EMPLOYMENT WITH PINNACLE HEALTH CORPORATION (APEX)."

Contention 2. "IF HOME HEALTH CARE SOLUTIONS GARNERED A BENEFIT FROM THE TRANSIT AND THE TRANSIT IS CONSIDERED PART OF THE APPLICANT'S EMPLOYMENT RELATIONSHIP, THE SAME LOGIC SHOULD BE APPLIED TO THE APPLICANT'S EMPLOYMENT WITH AFFINITY HOME HEALTH."

STATEMENT OF CASE

Defendant Home Health Care Solutions appeals the decision finding injury AOE/COE and that the claim is not barred by the going and coming rule.

II
FACTS

The applicant, an LVN, worked for three different agencies, Affinity Home Health (Affinity), Home Health Solutions (Solutions); and Pinnacle Health Corporation (Pinnacle also known as Apex.) providing at-home nursing services to patients using her own vehicle for transit between the patients' homes. (MOH/SOE pg. 6:22.5-24) These agencies required the use of the applicant's own vehicle, proof of insurance, and a copy of the applicant's driver license. (MOH/SOE pg. 7:1-

2.5, pg.12:14.5-15.5) She would see multiple patients through these different agencies on any given day. (Def. Ex. J Planned Visit Schedule) She worked for Solutions for about 10 years when Solutions asked her to take patients through Affinity and then Affinity asked her to take patients through Pinnacle/Apex. It is customary to have multiple agencies as an LVN. The agencies were aware of it and were not opposed to it. (MOH/SOE Pg.12:9.5-13.5) On February 23, 2017, after the applicant finished seeing a patient through Solutions (Ex. J Planned Visit Scheduled, 2/23/17 Robert Wallace 9:07 a.m.) she was involved in a motor vehicle accident while on her way to see a patient through Pinnacle. (Def Ex. J Planned Visit Scheduled, 2/23/17, Eddie Nelson 10:30 am) Pinnacle's insurance carrier, Insurance Company of the West, admitted the claim, provided benefits and continues to do so. (MOE/SOE Stipulations Paragraph 1 and 4-7) Solutions and Affinity denied the claim, contending that the going and coming rule barred it. (MOH/SOE pg.3, Issues paragraphs 2 & 10) Parties proceeded to trial on the issue of AOE/COE and the going and coming rule as well as other issues that are not a subject of the Petition for Reconsideration. The court found AOE/COE with regard to Solutions and that the going and coming rule did not bar the claim. The court did not find AOE/COE with regard to Affinity. Home Health Care Solutions (Solutions) has petitioned for Reconsideration of this decision.

III
DISCUSSION

Contention 1. HOME HEALTH CARE SOLUTIONS NO LONGER RECEIVED ANY BENEFITS FROM THE APPLICANT AFTER THE APPLICANT LEFT THEIR PATIENT AND BEGAN TO TRAVEL TO A PATIENT WHOM SHE SAW THROUGH HER EMPLOYMENT WITH PINNACLE HEALTH CORPORATION (APEX).

Defendant's petition refers to the California Supreme Court's Decision of *Ocean Accident & Guarantee v. IAC* 173 Cal. 313 that issued in 1916, involving the going and coming rule to support applying the rule here. *Ocean* found that the employee was not rendering any service to the employer at the time of the commute (Pet. pg. 3:14-16.5) However, defendant's use of this rationale is no longer germane. Subsequently, the Supreme Court not only criticized[1] but eventually discarded *Ocean's* rationale in 1942 in *Cal. Cas. Indem. Exch. V. Ind. Acc. Comp.* (1942) 21 Cal. 2d 461. The Supreme Court noted that rationale had been discarded when it analyzed the going and coming rule and the automobile requirement exception in *Hinojosa v. WCAB* 8 Cal. 3d 150, 37 Cal. Comp Cases 734. The *Hinojosa* court noted that each case should be adjudged on its own unique facts and stated that,

> By 1942, Justice Traynor, speaking for a unanimous court in *Cal. Cas. Indem. Exch.* v. *Ind. Acc. Com. (1942) 21 Cal.2d 461 discarded the requirement on which the rationale of the "going and coming rule" established in Ocean Accident had rested -- that the employee must, at the time of the injury, be performing service*

[1] In the years immediately following the decision in Ocean Accident, the courts soon realized that the principle announced in that case did not universally apply. In fact, only three years after the decision, the court in *Judson Mfg. Co.* v. *Ind. Acc. Com.* (1919) 181 Cal. 300, 303 disapproved of "this sweeping *dictum* . . . not necessary to the decision of the case," in *Ocean Accident*, "that all those accidental injuries which occur while the employee is going to or returning from his work are excluded from the benefits of the act." The court in *Judson* cautioned against laying down any such absolute dictate, advising instead that the courts should consider each set of facts in light of the words of the statute. (*Hinojosa* 8 Cal. 3d 150, 154; 37 Cal. Comp. Cases 734, 736)

> *to the employer to be eligible for compensation.* In granting compensation to a stenographer injured in an automobile accident in a company car on her way home from work, the court commented, "Petitioner contends that the applicant was not acting within the course of her employment at the time of her injury because she was not performing any service growing out of or incidental to her employment. *It is not indispensable to recovery, however, that the employee be rendering service to his employer at the time of the injury."* (*Id*., at p. 465.) (Hinojosa at 155, 737); (Emphasis added by this court)

Hinojosa noted that many situations did not involve local commutes and that there were extraordinary transits that vary from the norm because the employer required a special, different transit, means of transit, or use of a car, for some particular reason of its 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 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.*
>
> (*Hinojosa* 37 Cal. Comp. Cases 734, 739 emphasis added by this court)

In addition, *Hinojosa* noted the implied or express requirement of a vehicle,

> Finally, the situation which reflects the instant one is that in which the employee is expressly or impliedly required or expected to furnish his own means of transportation to the job (*Smith* v. *Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 814 [73 Cal. Rptr. 253, 447 P.2d 365]). Larson states that in this instance: ". . . the obligations of the job reach out beyond the premises, making the vehicle a mandatory part of the employment environment, and *compel the employee to submit to the hazards associated with private motor travel, which otherwise he would have the option of avoiding*
> (*Hinojosa* at 160, 37 Cal. Comp. Cases 734, 741 emphasis added by this court)

Accordingly, *Hinojosa* held that the job was structured and dependent upon transportation from one place of work to another so that the use of an instrument of such transportation was a requisite of employment.

The Court of Appeal applying these principles, in a case involving a Department of Social Services home caretaker, found that the coming and going rule did not apply, as the transit, which led to the injury, was not between the injured worker's home and the workplace at a fixed time. [*Zhu v. WCAB (State Dept. of Social Services)* 12 Cal. App. 5th 1031.] The *Zhu* Court analyzed whether the transit between the patients' homes was at the employer's express or implied request, or whether the transit was part of the employment relationship. It found that the transit bestowed a direct benefit on the Department, as it knew the injured worker serviced more than one home a day, and had to transit between home and that the transit was at the implied request of the Department.

Using *Hinojosa* and *Zhu*, this court analyzed the transit involved in this case. Here, the motor vehicle accident occurred while in transit from completing nursing services for a patient through Solutions while on the way to complete services for a different patient through Pinnacle/Apex. Accordingly, this transit was a part of the employment relationship between the applicant and these two agencies. As Pinnacle has already accepted and has been administering the claim, the court need only address the issue as to Solutions.

The applicant's unrebutted testimony established that she was required to use her own vehicle. (MOH pg.7:2.5) She was required to provide a copy of her driver's license and proof of car insurance (MOH pg. 12:14.5-16) thereby meeting the explicit requirement for a vehicle. In addition, it was customary to have multiple employers and agencies. She saw more than one patient on any given day from Solutions and it encouraged her to accept work from a different agency, Affinity. (MOH pg.12:9.5-13.5) Clearly, the applicant would not be able to travel and see multiple patients with different agencies without a vehicle also meeting the implicit standard in *Hinojosa*. Like *Zhu*, the applicant was not commuting between her home and the workplace at a fixed time but instead was traveling between patients.

This court is cognizant that this case is somewhat distinguishable in that the patients involved in *Zhu* were under one employer, the Department of Social Services and the transit here involved two different employers, Solutions and Pinnacle/Apex, which is why presumably Solutions argues it gained no benefit from applicant's travel to the next patient with Pinnacle. However, as the Supreme Court in *Cal. Cas. Indem. Exch.* v. *Ind. Acc. Com.* (1942) 21 Cal.2d 461 noted, *"It is not indispensable to recovery, however, that the employee be rendering service to his employer at the time of the injury"* Therefore, the applicant in this case need not be rendering a service to Solutions in order to recover.

Instead, when taking all factors as a whole, it is reasonable to extend the transit as part of the applicant's employment with Solutions. Those factors include the required use of the applicant's own vehicle (both an explicit and implicit requirement of her job with Solutions) and the applicant's ability to transit, which bestows a direct benefit on Solutions as it allowed the applicant to service different patients throughout the day. It was also aware that the applicant performed work for different agencies, did not oppose it, and in fact is the one that suggested it. Therefore, Solutions' automobile requirement caused the applicant to submit to the hazards associated with private motor vehicle travel, which she otherwise would have had the option of avoiding. In other words, she would not have been at the location of the accident had she not left the Solutions' patient's house. This automobile requirement and use of it for transit between patients was sufficient to extend the employer-employee relationship after seeing the Solutions patient. Hypothetically, had the applicant been commuting back home, Solutions would have been liable based on the automobile exception to the going and coming rule, even though no benefit would have been bestowed upon Solutions by virtue of her commute home. However, given the required use of an automobile, the employer-employee relationship would have extended until the injured worker would have arrived home. Similarly, it should extend after she left the Solutions patient's home while on the way to the next patient even if that patient was with a different employer, Pinnacle/Apex. This court did not find it reasonable to find that liability should turn on *where* applicant's destination was to end that day. It is the fact that both the Solutions and Pinnacle/Apex job required transit and use of the applicant's automobile that put the applicant at a greater risk for

a motor vehicle accident because she was in a car on a more frequent basis than the average commuter because of her job with *both* Solutions and Pinnacle on that particular day. Accordingly, the court found AOE/COE for both Solutions and Pinnacle and that the claim was not barred.

Contention 2. IF HOME HEALTH CARE SOLUTIONS GARNERED A BENEFIT FROM THE TRANSIT AND THE TRANSIT IS CONSIDERED PART OF THE APPLICANT'S EMPLOYMENT RELATIONSHIP, THE SAME LOGIC SHOULD BE APPLIED TO THE APPLICANT'S EMPLOYMENT WITH AFFINITY HOME HEALTH.

The court did consider Affinity Home Health's liability and the court disagrees that the same logic applies to find Affinity Home liable. No transit with Affinity was involved at the time the injury occurred. The fact that she saw two Affinity patients earlier in the day and was scheduled to see another through Affinity that same day did not establish any transit occurred between the applicant and Affinity at the time of the accident. She was not going to nor was she coming from any patient involving Affinity at the time of the accident. While her job with Affinity also required use of an automobile, no transit occurred linking applicant with Affinity at the time the injury occurred. Accordingly, the court did not find AOE/COE with regard to Affinity.

IV
RECOMMENDATION

It is respectfully requested that the petition be denied.

DATE: August 5, 2022

Monika Reyes
WORKERS' COMPENSATION JUDGE