WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GLORIA MONTES, *Applicant*

vs.

FAMILY RANCH, INC.; ZENITH INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ12479931
Stockton District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration of the Findings of Fact, Orders, and Opinion on Decision (F&O) issued on May 21, 2021, by the workers' compensation administrative law judge (WCJ). In the F&O, the WCJ found that applicant's injury on April 23, 2019 arose out of and was in the course of her employment (AOE/COE) with defendant and was not barred by the going and coming rule.

Defendant argues that the WCJ erred in applying the special risk exception to the going and coming rule because the risk that caused applicant's auto accident exists as part of a normal commute. Defendant further argues that the personal vehicle exception does not apply because applicant was not required to use a personal vehicle to complete her work duties.

Applicant filed an Answer, which has been considered.

The WCJ submitted a Report and Recommendation ("Report"), wherein he recommended that reconsideration be denied.

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[1] Commissioner Lowe was on the panel that issued the order granting reconsideration. Commissioner Lowe no longer serves on the Appeals Board. A new panel member has been substituted in her place.

Based on our review of the record, the allegations of the Petition and the Answer and the contents of the Report, and for the reasons we will explain, as our Decision After Reconsideration, we will affirm the WCJ's decision.

FACTS

Applicant sustained an injury as part of an auto accident that occurred on April 23, 2019. (Joint Exhibit 101, CHP Traffic Collision Report, April 23, 2019.) Applicant was on a highway and slowing down to make a left-hand turn. (*Id*. at p. 2.) It was dawn, around 5:45AM and everyone's headlights were on. (*Id*. at p. 3.) Applicant's vehicle was rear-ended, pushing it into the oncoming lane of traffic where it collided head-on with a big-rig truck. (*Id*. at p. 4.) Applicant's husband was driving the car. (*Id*. at p. 9.) He died of his injuries after being transported to the hospital. Applicant sustained significant injuries and had to be extricated from the car using the jaws of life. (Applicant's Exhibit 1, Report of QME Dinesh Sharma, M.D., November 20, 2020, p. 6.)

Applicant worked in fields as a fruit picker and tree thinner. (*Id*. at p. 5, lines 4-16.) Applicant testified that she was headed to work at the time of the accident. (Transcript of Record, April 22, 2021, p. 3, lines 20-22.) They were turning left onto the street where the fields were located. (*Id*. at p. 3, lines 23-25.)

They drove from field to field throughout their workday. (*Id*. at p. 6, lines 22-24.) They used their own vehicle; the employer did not offer transportation between fields. (*Id*. at p. 6, line 25, through p. 7, line 5.) They would transport tools used on the job in their vehicle as they moved from field to field. (*Id*. at p. 7, line 25, through p. 8, line 7.) Applicant would use her own shears and harness. (*Id*. at p. 13, line 23, through p. 14, line 2.) She would need shears to do her job and the employer did not provide them. (*Id*. at p. 14, lines 3-14.)

The accident occurred on a county-maintained road while applicant was commuting to work from home. (*Id*. at p. 12, lines 1-15.)

The day prior to the accident, applicant's foreperson let her know where to report the following morning. (*Id*. at p. 13, lines 1-5.)

Applicant owned the car she was riding in. (*Id*. at p. 15, lines 5-7.)

The county road where the accident occurred is right next to the field where applicant was supposed to work that day. (*Id*. at p. 29, lines 1-3.)

DISCUSSION

The "going and coming rule" ordinarily makes non-compensable an injury sustained during a normal commute to or from work by an employee who has a fixed place of work and fixed work hours. (*Hinojosa v. Workmen's Comp. Appeals Bd*. (1972) 8 Cal.3d 150, 157 [104 Cal. Rptr. 456, 501 P.2d 1176, 37 Cal.Comp.Cases 734].) The going and coming rule essentially derives from the fact that, under California law, a condition of compensation is that the employee must be "performing service" to the employer at the time of injury and must be "acting within the course of his or her employment." (Lab. Code, § 3600(a)(2).) The courts have concluded that, generally, an employee is not rendering any service to the employer, and the employment relationship is suspended, from the time the employee leaves his work to go home until he resumes his work. (*Santa Rosa Junior College v. Workers' Comp. Appeals Bd*. (1985) 40 Cal.3d 345, 352 [50 Cal.Comp.Cases 626].) However, there are several exceptions to the 'going and coming' rule.

First is the 'required vehicle' exception. The Court held in *Smith v. WCAB* (1968) 69 Cal. 2d 814, 820 [33 CCC 771] that an employee "'is performing service growing out of and incidental to his employment' when he engages in conduct reasonably directed toward the fulfillment of his employer's requirements, performed for the benefit and advantage of the employer." In *Smith*, the employer required the worker to furnish a vehicle of transportation on the job and the Court found that this "curtails the application of the going and coming exclusion." (*Id*. at 820.)

Next, is the "special risk" exception, which provides for compensation for injuries sustained during a commute to or from work if the injury was caused by a special risk related to the employment, and will apply if (1) but for the employment, the employee would not have been at the location where the injury occurred and (2) "the risk is distinctive in nature or quantitatively greater than risks common to the public." (*General Ins. Co. v. Workers' Comp. Appeals Bd*. (*Chairez*) (1976) 16 Cal. 3d 595, 601-602 [128 Cal. Rptr. 417, 546 P.2d 1361, 41 Cal. Comp. Cases 162].) The fact that an accident happens upon a public road and that the danger is one to which the general public is likewise exposed does not preclude the existence of a causal relationship between the injury and the employment if the danger is one to which the employee, by reason of the employment, is subjected to the risk "peculiarly or to an abnormal degree." (*Chairez*, *supra*, 16 Cal. 3d at p. 601 quoting *Freire v. Matson Navigation Co*. (1941) 19 Cal. 2d 8, 12, 118 P.2d 809 [6 Cal. Comp. Cases 302].)

The special risk exception, however, generally applies to commute-related conditions in the immediate vicinity of the employer's premises that require the commuting employee to go through "a zone of danger." (See, e.g., *Parks v. Workers' Comp. Appeals Bd*. (1983) 33 Cal. 3d 585 [190 Cal. Rptr. 158, 660 P.2d 382, 48 Cal. Comp. Cases 208] (teacher assaulted while stopped in traffic by children leaving school just after leaving employer's premises; injuries found compensable because teacher was subjected on a daily basis to a greater risk than that to which a passing motorist would be subjected on an occasional or sporadic basis); *LeFebvre v. Workers' Comp. Appeals Bd*. (1980) 106 Cal. App. 3d 745 [165 Cal. Rptr. 246, 45 Cal. Comp. Cases 601 (employer allowed loose gravel to remain on bike path at premises entrance forcing employee to make left turn into private driveway); *Greydanus v. I.A.C*. (1965) 63 Cal. 2d 490, 47 Cal. Rptr. 384, 407 P.2d 296 [30 Cal. Comp. Cases 376] (to reach employer's premises, employee was required to turn left across two-lane highway, a risk not normally shared by the public); *Pacific Indem. Co. v. I.A C.* (*Henslick*) (1946) 28 Cal. 2d 329, 170 P.2d 18 [11 Cal. Comp. Cases 148] (employee required to make left turn to enter employer's premises).)

We agree with the WCJ that both exceptions apply to the facts of this case. As to the special risk exception, applicant was in her car turning left into the place of employment. The fields where applicant worked were adjacent to the highway. The left-hand turn from the highway into the place of employment is nearly identical to the facts of *Greydanus*, *supra*, which found the special risk exception to apply.

Furthermore, applicant was required to use her vehicle to travel from field to field. She was also required to use her vehicle to store tools needed to complete her job. Both of these facts establish the required vehicle exception. The employer provided no transportation to the employees who moved throughout the day. The employer benefited from applicant bringing her car to work and transporting tools needed to complete the job. Thus, the 'going and coming' rule does not apply to bar applicant's claim of injury.

Accordingly, we affirm the WCJ's decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact, Orders, and Opinion on Decision issued on May 21, 2021, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 26, 2024

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

GLORIA MONTES
LAW OFFICE OF GARY C. NELSON
CHERNOW AND LIEB

EDL/oo

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