WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JEAN CONCEPCION, *Applicant*

vs.

NORWALK INTERCOM HEALTHCARE; ZURICH NORTH AMERICA INSURANCE, administered by GALLAGHER BASSETT SERVICES, *Defendants*

Adjudication Number: ADJ18125440
Anaheim District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of our November 4, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (O&O) wherein we granted reconsideration of a July 31, 2024 Findings and Order and reversed the workers' compensation administrative law judge's (WCJ's) finding that applicant's August 4, 2022 claim of injury to the neck, back, psyche, sleep, internal, left knee, bilateral shoulders, head and other body systems was barred by the going and coming rule, post termination defense per Labor Code[1] section 3600(a)(10), and six-month rule for psyche claims under section 3208.3(d).

Defendant contends that applicant is not a credible witness, and applicant's injury did not arise out of and in the course of employment, as contemplated under section 3600(a), as applicant was commuting to work rather than "performing a service growing out of and incidental to his employment." (Petition, p. 6.) Defendant therefore continues to argue that applicant's claim is barred by the going and coming rule and does not fall under any exceptions outlined in *Hinojosa v. Workmen's Comp. App. Bd.* (1972) 8 Cal.3d 150, 157 [37 Cal.Comp.Cases 734].

We have received an Answer from applicant. We did not receive a new Report and Recommendation on Petition for Reconsideration (Report) from the WCJ.

[1] All further statutory references will be to the Labor Code unless otherwise indicated.

We have considered the Petition for Reconsideration (Petition), the Answer, and have reviewed the record in this matter. For the reasons discussed below, we will deny the Petition.

FACTS

Applicant claimed that while employed by defendant as a marketing director on August 4, 2022, he sustained an industrial injury to his head, neck, back, bilateral shoulders, left knee, psyche, sleep, internal, and other body systems. Applicant alleged he was delivering donuts to a client when he was involved in a motor vehicle accident.

Applicant's supervisor was Romyn Patel. Applicant texted Mr. Patel on August 4, 2022 notifying him of the injury. It is unclear whether applicant was provided with a claim form or notice of potential eligibility for workers' compensation benefits.

In an August 11, 2022 text exchange between applicant and Mr. Patel, applicant submitted a copy of an August 9, 2022 notice from Bob Binafard, D.C. taking applicant off work from August 4, 2022 to September 15, 2022 due to the August 4, 2022 motor vehicle accident. (Exhibit 6.)

Applicant filed an Application for Adjudication of Claim on August 23, 2023.

On June 12, 2024, the parties proceeded to trial. Applicant raised the issue of injury arising out of and in the course of employment and defendant raised the issues of the going and coming rule, post termination defense, and section 3208.3(d).

Applicant testified in relevant part as follows:

> [H]e was a Marketing Director Liaison. He was hired June, 2022. He was hired by the administrator Romyn Patel. His job duties were marketing 70 percent of the time. He would talk to case managers and any family members of potential patients that needed the facility. The facility he worked at was a nursing facility and rehab, and they did long-term care and subacute care. The rehab was for patients with slip-and-fall injuries to recover and regain full function to go back home.
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> The equipment the applicant was provided was petty cash, pens, and brochures. He could expense doctors [*sic*] lunches. He was not provided a vehicle. He used his own car. Mr. Patel told him he had to travel. He travelled 50 percent out in the field, 30 percent going to the facility giving tours to family members, and doing daily reports.
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> Mr. Patel did not tell the applicant where he had to go. There was a doctor roster and clients they already worked with. He had a list for potential jobs. The locations he would go to were provided by Mr. Patel and himself. They would discuss where

he was going to go. His clients were located in Norwalk. In about one mile there were several doctors and assisted living facilities. He would also go to Los Angeles.

The applicant was pretty consistent to go to the client's offices weekly and to obtain referrals; he would build rapport with clients; he would give the family members peace of mind; he would arrange for transportation needed to and from the facilities, for instance, from the hospital to the facility where he was located at; he would bring goodies; he was to represent the employer. He believed giving goodies was a way to getting in good with clients. When he would provide Panera Bread, doughnuts, or Costco to bring to the nurses, he would not go that far from where the location he was going to.

The applicant was dressed in a suit and tie. Mr. Patel knew the applicant would bring goodies to potential clients. He would be reimbursed by filling out a sheet and given to the administrator, who would then give the form to the corporate office. He filled one out once a month. He was never told to bring goodies to these people. He was never told that he was required to bring them goodies, but he believed that is what the petty cash was for. He would spend it on the doctors and administrators. It was standard practice to give them pens and brochures.

The applicant did have a discussion with how petty cash was to work and the administrator would sign off. He just knew it from prior experience. Mr. Patel would hand him the petty cash, he would sign it off, and it would go to corporate office. He would be reimbursed with a check. He would be reimbursed for mileage. He was not sure of the rate. He only submitted his mileage once. If he did not submit mileage, he would lose out on it. There was no deadline, but they wanted it within a month.

On August 4, 2022, when the applicant was in his motor vehicle accident, he was going to follow up with a client at a subacute facility and meet with Veronica and her team. He wanted to give them doughnuts. He was going to call [at] Coast Plaza Hospital. He left his house at 8:50 a.m. A half a mile away from his house is Coast Plaza Hospital. He stopped to get doughnuts. He does not recall the expense, but he knows that they were expensive. He wanted to thank them for the referral and did not want to come empty-handed. He believed he was going to be reimbursed for the doughnuts. He did not eat the doughnuts. He was hit by a person running a red light on the way to the hospital on Studebaker Street, three blocks from the hospital.

The applicant texted the employer after the accident. The employer was concerned but wanted him to come in. He told his employer that he was not feeling well after the accident….

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The applicant told the administrator, the in-house administrator, and the office manager in HR of his accident. Then the applicant doubled back and said they heard it through the grapevine, and that he only told the administrator and the HR. Then

he re-testified and said he told the assistant, in-house coordinator, and HR. He thinks he called Darlene at HR. No one gave him a claim form.

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…Forty percent of the time he would go to the jobsite and then go out to make his rounds, but it would depend on the day. He always told Mr. Patel what was going on. Sixty percent of the time, he would be out at clients' locations. He would try to visit four facilities a day. He would see clients in the morning before he went to the employment jobsite. He would go back to the employer around 3 p.m. At 3 p.m. he would do reports, and then he would leave again to see other clients. He was never disciplined for going to the jobsite. He was never told not to go to the jobsite.

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Several times the applicant bought doughnuts for clients at different locations. It was his decision to buy doughnuts and where to buy the doughnuts at. He would usually do it close to his house and the hospital. The applicant stated that prior to the accident he told Mr. Patel he was purchasing doughnuts and, for the most part, Mr. Patel would say yes. He would not have to tell Mr. Patel every time he purchased. They would have discussions on their texts, over the phone, or face-to-face. Sometimes they would plan ahead on what they could budget. Sometimes they would spend extra for clients and buy the clients' offices lunch.

(Minutes of Hearing and Summary of Evidence, June 12, 2024, pp. 4-7.)

Applicant's supervisor Romyn Patel testified in relevant part as follows:

Mr. Patel works at Intercommunity Healthcare Norwalk. He is a facilities administrator. He was hired in April of 2022…. He managed the facility and the compliance. He was the applicant's supervisor. The injured worker was an hourly employee….

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There was a biometric punch clock located by the front door near Mr. Patel's office. He observed the injured worker using the biometric punch clock. He was required to start each working day at the facility. His timecard was adjusted a few times. If he forgot to punch in, they would submit a time adjustment form. Mr. Patel would have been made aware of the applicant's timecard being adjusted. He did not have any meetings with the injured worker about his timecard being adjusted. He probably had it adjusted less than five times.

The injured worker's job requirements were: business development, marketing, meeting case managers at the hospital, and visiting new patients. The job requirements at the facility were: meeting with members from the departments every morning; discuss if beds were available, male or female availability; discuss isolation beds that would be a three-bedroom room but might only be able to accommodate one patient, due to isolation; and discussion on how the scenarios regarding the beds would change daily and frequently throughout the day.

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Mr. Patel was aware that the applicant suffered a motor vehicle accident on August 4, 2022. He was not aware that the injured worker planned on picking up doughnuts that day. Mr. Patel does not think he authorized the applicant to purchase doughnuts. The applicant did tell Mr. Patel that he was going to Coast Plaza Hospital before clocking in….

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The injured worker would regularly interact with the admissions coordinator. There is a doughnut shop next door to Intercommunity. The injured worker would bring doughnuts to the staff of the facility, his co-workers. This was not considered marketing, but a friendly co-worker gesture.

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…The night of the accident, Mr. Patel believes that he got a text from the applicant that said he was being discharged from the hospital, and that was at about 7 p.m….

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Mr. Patel asked the injured worker if he was okay after the accident. He called him, and the injured worker texted him and he texted back. He attempted to call him but he was told he was in the hospital, which he communicated via text…. He did not layoff the injured worker. He did not tell him to pick up his last paycheck….

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…The injured worker manages his own petty cash, about $500 a month. The purpose of the petty cash is for business development. The injured worker knows that the petty cash is for business development and how to use it. He is to sign off on it. Mr. Patel has never denied a request for petty cash. He has never told the injured worker he could not use the petty cash for business development….

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The applicant is paid mileage…. To Mr. Patel's knowledge, the applicant attended all the meetings…. Petty cash for marketing was explained to the injured worker. He would receive $500 for doctors and case managers, which was not much.

(Minutes of Hearing and Summary of Evidence, June 12, 2024, pp. 10-24.)

On July 31, 2024, the WCJ issued a Findings and Order indicating that applicant's August 4, 2022 injury claim was barred by the going and coming rule, post termination defense under section 3600(a)(10), and six-month bar to psyche claims under section 3208.3(d).

On August 26, 2024, applicant filed a Petition for Reconsideration of the July 31, 2024 F&O.

On November 4, 2024, the Appeals Board issued an Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration reversing the above findings by the WCJ.

DISCUSSION

I.

Preliminarily, former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
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> (b)
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> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected under the Events tab in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on November 25, 2024, and 60 days from the date of transmission is January 24, 2025. This decision is issued by or on January 24, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to our review of the record, we did not receive a new Report from the WCJ. However, a notice of transmission was served by the district office on November 25, 2024, which is the same day as the transmission of the case to the Appeals Board. Thus, we conclude

that the parties were provided with the notice of transmission required by section 5909(b)(1), and consequently they had actual notice as to the commencement of the 60-day period on November 25, 2024.

II.

Turning now to the merits of the Petition, defendant argues that applicant is not a credible witness, and applicant's injuries did not arise out of and in the course of employment, as contemplated under section 3600(a), as applicant was simply commuting to work rather than "performing a service growing out of and incidental to his employment." (Petition, p. 6.) As such, defendant continues to believe that applicant's claim should be barred under the going and coming rule.

As explained in our November 4, 2024 O&O, under the going and coming rule, "an employee does not pursue the course of his employment when he is on his way to or from work." (*Smith v. Workmen's Comp. Appeals Bd.* (*Smith*) (1968) 69 Cal.2d 814, 815-816 [33 Cal.Comp.Cases 771] citing *Zenith Nat. Ins. Co. v. Workmen's Comp. Appeals Bd.* (1967) 66 Cal.2d 944, 946.) Thus, injuries sustained while an employee is "going and coming" to and from the place of employment do not normally arise out of and in the course of employment because the employee is neither providing benefit to the employer nor under the control of the employer during that commute. (*Santa Rosa Junior College v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 345, 351–352 [1985 Cal. LEXIS 410]; *Hinojosa v. Workers' Comp. Appeals Bd.* (*Hinojosa*) (1972) 8 Cal.3d 150, 157 [37 Cal.Comp.Cases 734].) "It applies to a 'local commute enroute to a fixed place of business at fixed hours.' (*Hinojosa*, *supra*, at p. 157.)" (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038 [82 Cal.Comp.Cases 692].)

There are several exceptions, however, to the "going and coming" rule. One such exception is the required vehicle exception, which may be invoked when "the employee is expressly or impliedly required or expected to furnish his own means of transportation to the job." (*Hinojosa, supra*, at p. 160 citing *Smith*, *supra*, at p. 814.) "The exception 'arises from the principle that an employee "is performing service growing out of and incidental to his employment" (Lab. Code, § 3600) when he engages in conduct reasonably directed toward the fulfillment of his employer's requirements, performed for the benefit and advantage of the employer.' (*Smith*, *supra*, at pp. 819–820.)" (*Zhu*, *supra*, at pp. 1031, 1039.)

Applicant's supervisor, Romyn Patel, previously confirmed at trial that applicant's job duties included "business development, marketing, meeting case managers at the hospital, and visiting new patients." (Minutes of Hearing and Summary of Evidence, June 12, 2024, p. 10.) There was no dispute that these job duties required applicant to use his own vehicle, particularly since applicant was regularly reimbursed for mileage. Further, applicant indicated that on the date of the injury, he was on his way to "follow up with a client at a subacute facility" to "give them doughnuts" as a thank you "for the referral." (*Id*. at p. 5.)

Although it is true that Mr. Patel testified that he did "not think he authorized applicant to purchase doughnuts" on the date of injury, he also testified that applicant occasionally brought "doughnuts to the staff of the facility" though this was "not considered marketing" so much as a "friendly co-worker gesture." (Minutes of Hearing and Summary of Evidence, June 12, 2024, p. 11.) Further, applicant made food purchases for clients in the past, including donuts and lunch. (See Exhibits 8-10 and 12-14, texts from applicant to Mr. Patel, June 23, 2022 - July 20, 2022.) Applicant also testified that he occasionally "bought doughnuts for clients at different locations" and did not "have to tell Mr. Patel every time he purchased." (Minutes of Hearing and Summary of Evidence, June 12, 2024, pp. 6-7.) This specific testimony was not contradicted by defendant. Significantly, applicant was also provided with $500.00 in petty cash by defendant, which was used to purchase items, such as donuts and lunch, to take to clients. Based upon the totality of the evidence, we therefore found applicant was performing a service growing out of and incidental to his employment that was reasonably directed toward fulfilling duties for the benefit and advantage of the employer.

Lastly, we continue to find that applicant's doughnut stop would also be covered under the "minor deviation" exception to the going and coming rule, as contemplated in *Scripps Home Healthcare v. Workers' Comp. Appeals Bd.* (2001) 67 Cal.Comp.Cases 94 (writ den.). Like the applicant in *Scripps*, the car applicant used was his own, as required by his employment. Further, as in *Scripps*, applicant was on his way to one of the multiple sites he visited as a part of his duties for work when he made the brief visit to pick up a box of doughnuts. As explained previously, the fact that applicant was not on call at the time of the injury is not dispositive. Ultimately, based upon the overall facts of the case, the stop was at most a minor deviation. Accordingly, we deny defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of our November 4, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 22, 2025

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

JEAN CONCEPCION
LAW OFFICES OF JAMES YANG
ALBERT AND MACKENZIE

RL/*cs*

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