WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIO RILEY, ***Applicant***

vs.

AP CONCRETE, INC.;
AMTRUST NORTH AMERICA, ***Defendants***

Adjudication Number: ADJ18514002
Van Nuys 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.

I.

Former Labor Code[1] 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.
>
> (b)
>
> (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.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

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

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 in Events 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 September 24, 2025, and 60 days from the date of transmission is Sunday, November 23, 2025. The next business day that is 60 days from the date of transmission is Monday, November 24, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, November 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 the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 24, 2025, and the case was transmitted to the Appeals Board on September 24, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 24, 2025.

II.

Section 3600(a) provides for liability for injuries sustained "arising out of and in the course of the employment." An employer is liable for workers' compensation benefits "without regard to negligence." (Lab. Code, § 3600(a).) The course of employment ordinarily refers to the time, place, and circumstances under which the injury occurs. (*Latourette v. Workers' Comp. Appeals*

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

Bd. (1998) 17 Cal.4th 644, 651 [63 Cal.Comp.Cases 253].) Arising out of employment means that it must occur as a reason of a condition or incident of the employment; the employment and the injury must be linked in some causal fashion. (*Id*.) An employee bears the burden of proving the injury arose out of and in the course of the employment (AOE/COE) by a preponderance of the evidence. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.) Whether an employee's injury arose out of and in the course of employment 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, 353 [67 Cal.Comp.Cases 51].)

Further, "[a]cts of 'personal convenience' are within the course of employment if they are 'reasonably contemplated by the employment [citations].'" (*Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 568 [49 Cal.Comp.Cases 773]; see also *DeMirjian v. Ideal Heating Corp.* (1954) 129 Cal.App.2d 758, 765-767 ["Cessation of work for eating, drinking, warming himself, and similar necessities are necessary incidents of employment"].) "[A]cts as are 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. [citations]." (*Price*, *supra*, at pp. 567-568.) Thus, even if an employee is engaged in 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. Here, applicant's use of the inversion table was reasonably contemplated by the employment in this circumstance and therefore the injury the applicant sustained is AOE/COE.

Additionally, we have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). *(Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s). (*Id*.) Therefore, we will not disturb the WCJ's finding that the injury was AOE/COE.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 24, 2025

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

MARIO RILEY
ARASH LAW
INGER & WEINBERG

JMR/*pm*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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JOINT REPORT & RECOMMENDATION ON PETITION FOR RECONSIDERATION

Defendant AP Concrete, insured by Technology Insurance, administered by Amtrust, through Counsel INGBER WEINBERG, timely files a 09/12/2025 Joint Petition for Reconsideration of the 08/20/2025 Findings and Award and Opinion on Decision upon the following grounds:

[1] That pursuant to Labor Code §5903(a): That by the instant Findings, Award and Order herein, the Workers' Compensation Judge acted without or in excess of its powers;

[2] That pursuant to Labor Code §5903(c): The evidence admitted in this case does not justify the Findings of Fact made herein; and The Petitioner provides the issues of:

[3] That pursuant to Labor Code §5903(e): The Findings of Fact are not supported by the Decision and Order. The Opinion on Decision does not support the Findings of Fact herein.

The issues presented are: Whether a rebuttal witness was properly excluded when not listed on the Pre-Trial Conference Statement.

FINDINGS OF FACT

Applicant, a 52-year-old carpenter for AG Concrete, Inc., sustained catastrophic industrial injuries on October 27, 2023, including quadriplegia, traumatic brain injury, and multiple orthopedic and internal traumas. He was transported to Kaiser Permanente for stabilization and then transferred to Arrowhead Regional Medical Center for emergency cervical spine surgery and other procedures. Following nearly two months of hospitalization, the Applicant underwent further inpatient rehabilitation at multiple facilities. Qualified Medical Evaluator Dr. Thomas later diagnosed him with traumatic cervical and thoracic spine injuries resulting in quadriplegia.

In terms of the date of injury, the believable testimony of Mario Riley (Riley) noted that workers were required to arrive early to unload the toolshed once unlocked, under the supervision of Foreman Pedro De Le Riva, and load equipment onto a tractor by 6:30 a.m.

On October 26, 2023, the day before the incident, Applicant brought a portable inversion table to assist with back conditioning. He used it openly with co-workers. Supervisor/Forman Pedro De La Riva (Here and after De La Riva allowed Riley to store the inversion table (table) in the locked toolshed overnight. The following morning, after unloading and loading tools, loading the tractor as directed, Applicant briefly used the inversion table before departure, in the sight of De Law Riva. Riley slipped from the table, during which he suffered a catastrophic fall and life-threatening injuries.

Riley began working for AG Concrete in October 2022. It is acknowledged that 10/26/2023 was the first time Riley brough and used the table.

The trial was held over several dates. The Pre-Trial Conference Statement (PTCS) was originally submitted 01/08/2025. The PTCS included witnesses including Riley, De La Riva, and Juan Ramirez. Depositions occurred of Riley and De La Riva. However, there was not a deposition of Juan Ramirez, or a notice of deposition for Juan Juarez. Again, the matter had been litigated since 2023.

Following the applicant's testimony given on 04/10/2025, the defense sought to call a rebuttal witness, Juan Juarez. This witness was mistakenly identified on the Pre-Trial Conference Statement as Juan Ramirez, but nonetheless he is known as "Juan." A subpoena was issued for his appearance, and it listed him as Juan Juarez. He did in fact appear on the trial dates of 04/10/2025 and 05/08/2025. On 04/10/2025, the WCJ issued Minutes of Hearing/Summary of Evidence noting the defense intended to call Juan as a rebuttal witness to which applicant attorney objected. The court allowed the applicant attorney the right to depose said additional witness regarding his proposed testimony (this was not done by said counsel). The issue was then deferred.

After testimony had begun on April 10, 2025, Defendant advised that it wished to call its alleged witness who was not raised on the PTCS. WCJ Marrone afforded the parties the opportunity to correct this mistake by permitting a deposition of the alleged witness prior to the next continued trial date.

On the next date of trial, 05/08/2025, the defense sought a ruling on allowing the rebuttal witness to testify. The WCJ inquired as to whether any such testimony would be relevant to the issue of AOECOE (Trial testimony, 05/08/2025, page 45, lines 7-9). The deposition of Juan Juarez was not attempted.

As an offer of proof, defense counsel stated Juan's testimony was quite relevant and would be offered as to the applicant's intent in bringing the table to the work site, i.e., for the sole purpose of selling it to said witness. Furthermore, the witness would testify regarding the actual start time of the work shift, and that it was not when the foreman unlocked the storage container (Trial testimony, 05/08/2025, page 45, lines 10-25; page 46, lines 1-13). Defense sought an additional opportunity to proceed with the deposition of Juan Juarez. However, given the delays in the case to that time and the serious nature of the injury, and the fact that benefits were not being provided to the injured worker, the request was declined.

Defense had more than adequate due process time to make a correction of the PTCS even in advance of the initial trial date, and they had adequate time to depose the correct witness if they wished. I believe that we already have a witness, Mr. De La Riva, who can answer these questions, or most of them." (See Trial Transcript 7 /22/25 p. 49 lines 6-11).

The Judge found injury AOE/COE on the comfort doctrine.

A. Is the preclusion of a witness not listed on the Pre-Trial Conference statement appropriate.

Labor Code § 5502 (c)(3) sets forth that unless the proponent of the evidence can demonstrate that the evidence was not available or could not have been discovered by exercise of due diligence prior to the mandatory settlement conference, the evidence is not admissible.

The Defense had knowledge of the witness. The PTCS was reviewed on a couple of occasions before the start of trial. The Parties were given the opportunity to depose the witness in place of the testimony being excluded all together. Therefore, this WCJ gave ample opportunity to the Defense to correct their errors. They Defense was provided due process without further delay of the case.

Applicant Counsel cites De Inga v. WCAB (2021) 86 CCC 488 (writ denied), the appeals board held that an Applicant's due process right to put on rebuttal evidence was not denied when the WCJ did not allow her to return to the stand for further testimony after both parties rested. It explained that rebuttal evidence is offered when a party is caught by surprise with unexpected evidence or testimony, and it found that no surprise issues came out during the defendant's case. The board found that the evidence the applicant wanted to introduce was cumulative of evidence already admitted and had no relevance to the issue at hand. It also found that the applicant's rebuttal witnesses could have testified during the pendency of her case, but she made a strategic decision not to call them.

It seems that Defense party waived the right to present rebuttal evidence by failing to make a timely request to do so Hegg/in v. WCAB (1971) 36 CCC 93, 103. See cott ,. WCAB (1969) 34 CCC 572 (writ denied); Sently Insurance v. WCAB (Berney) (1978) 43 CCC 38 (writ denied); Tiger Recreation Centers v. f,Ji CAB (Vara) (1980) 45 CCC 843 (writ denied).

Here, although Defendant claims it made a simple error in identifying a witness, it was afforded further opportunity to rectify its error even after testimony had begun but made the decision not to. It appears that this omission was both intentional and strategic in creating protracted and unnecessary litigation.

Further, the Defense had the opportunity to ask the questions of De La Riva. There was no testimony that the workers did not perform stretching in advance of the work shift. There is no evidence that De La Riva attempted to stop Riley from using the table.

There was no testimony that Juan Suarez was present for the event, either the day before or the day of the injury. The witness' testimony was not defined in advance of offering when opportunity arose. Only that the witness would testify, just as De La Riva stated, that Riley intended to sell Suarez the table. However, this does not negate the fact that Riley used the table in preparation for his hard day of work.

Applicant's injury is covered by the Personal Comfort Doctrine. Under the Personal Comfort Doctrine, injuries sustained during personal acts of comfort that take place on the employer's premises are usually compensable if not explicitly forbidden, as they are reasonably contemplated by employment. They include "the majority of an employee's acts upon the employer's premises, such as eating lunch, getting a drink of water, smoking tobacco were not forbidden by the employer, attending to the wants of nature, changing to or from working clothes, and many others." Fireman's Fund Indemnity Co. v. !AC (Elliott) (1952) 39 Cal. 2d 529, 532-33.

RECOMMENDATION

The Trial Judge recommends that the Petition for Recommendation be DENIED

THIS REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION WAS TRANSMITTED TO THE APPEALS BOARD ON: 09/24/2025

DATE: 09/24/2025

/s/ Jeffrey Marrone, WCJ

Jeffrey Marrone
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE