WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOHN CHORBAGIAN, *Applicant*

vs.

ORMCO CORPORATION; ACE AMERICAN INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ12278544
Long Beach 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, and for the reasons discussed below, we will deny reconsideration.

Preliminarily, we note that a petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice …." (*Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the Appeals Board failed to act on defendant's timely petition within 60 days of its filing on December 31, 2020, through no fault of defendant. Therefore, considering that the

Appeals Board's failure to act on the petition was in error, we find that our time to act on defendant's Petition for Reconsideration was tolled.

We now turn to the merits of the case. Labor Code[1] section 3600 imposes liability on an employer for workers' compensation benefits where its employee sustains an injury "arising out of and in the course of employment." Whether an injury arises out of and in the course of employment requires a two-prong analysis. (*LaTourett v. Workers' Comp. Appeals Bd*. (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].)

First, the injury must arise out of the employment, that is, occur by reason of a condition or incident of employment. (*Employers Mutual Liability Ins. Co. of Wisconsin v. Industrial Acc. Com. (Gideon)* (1953) 41 Cal.2d 676 [18 Cal.Comp.Cases 286, 288].) "[T]he employment and the injury must be linked in some causal fashion," but such connection need not be the sole cause, it is sufficient if it is a contributory cause. (*Maher v. Workers' Comp. Appeals Bd*. (1983) 33 Cal.3d 729 [48 Cal.Comp.Cases at page 326].) Second, the injury must occur "in the course of employment," which ordinarily "refers to the time, place, and circumstances under which the injury occurs." (*LaTourett v. Workers' Comp. Appeals Bd., supra*, 63 Cal.Comp.Cases at page 256.) An employee is acting within "the course of employment" when "he does those reasonable things which his contract with his employment expressly or impliedly permit him to do." (*Ibid*.) An employee necessarily acts within the "course of employment" when "performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied." (*Maher, supra*, 33 Cal.3d at p. 733.) Whether an employee's injury arose out of and in the course of employment (AOE/COE) 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 [67 Cal.Comp.Cases 51].)

The "going and coming" rule excludes from compensability injuries that occur while the employee is going to or returning from work in the routine commute. That is, injuries sustained during a ***local commute, to a fixed place of business, at fixed hours*** are not compensable. (*Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150 [37 Cal.Comp.Cases 734].) The rationale for this judicially created doctrine is that during an ordinary commute, the employee is not rendering any service for the benefit of the employer. (*City of San Diego v. Workers' Comp. Appeals Bd. (Molnar)* (2001) 89 Cal.App.4th 1385 [66 Cal.Comp.Cases 692].)

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

In this case, we agree with the WCJ's determination that applicant's claim is not barred by the going and coming rule. First, the going and coming rule was intended to exclude only injuries that occur during a routine commute, to a fixed place of business, at fixed hours. (*Hinojosa, supra.)* The going and coming rule is not applicable here because applicant was a salaried, mobile, regional sales person who essentially worked out of an employer provided vehicle. At the time of the injury, he was not engaged in a routine commute, to a fixed place of business, at fixed hours. Instead, he worked out of his vehicle making cell phone calls, sending and receiving emails, and driving throughout a large region that included California and Nevada to meet with clients. (Minutes of Hearing and Summary of Evidence (MOH/SOE) 9/22/20, at pp. 4:18 – 7:6.) On the day of the injury he was out on the field making cold sales calls on orthodontists and available for work contacts. (MOH/SOE 9/22/20, at p. 9:15-20.) He had dropped off material at an orthodontist's office before heading to the car dealership on a personal errand. (MOH/SOE 9/22/20, at p. 7:22-24.)

Moreover, even if the going and coming were applied to applicant's travel, the facts of this case bring it within several of the rule's many exceptions. (*Bramall v. Workers' Comp. Appeals Bd*. (1978) 78 Cal.App.3d 151 [43 Cal.Comp.Cases 288].) One of those exceptions consists of instances involving employer provided transportation. "It is well recognized, [] that if an employer, as an incident of the employment, furnishes his employee with transportation to and from the place of employment and the means of transportation are under the control of the employer, an injury sustained by the employee during such transportation arises out of and is in the course of the employment and is compensable." (*California Casualty Indem. Exchange v. Industrial Acci. Com.*, *(Duffus)* (1942) 21 Cal.2d 461, 463 [7 Cal.Comp.Cases 305, 306]; see also *Jimenez v. Liberty Farms Company* (1947) 78 Cal.App.2d 458 [12 Cal.Comp.Cases 62]; *D.H. Smith Company, Inc., v. Workers' Comp. Appeals Bd. (Martinez)* (2009) 74 Cal.Comp.Cases 1278) (writ den.).) The *Duffus* Court further stated that:

> 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. [] The essential prerequisite to compensation is that the danger from which the injury results be one to which he is exposed as an employee in his particular employment. This requirement is met when, as an employee and solely by reason of his relationship as such to his employer, he

> enters a vehicle regularly provided by his employer for the purpose of transporting him to or from the place of employment.
> (*Duffus, supra*, 21 Cal.2d at p. 463 (citations omitted).)

At the time of the accident applicant was driving an employer provided vehicle which he used to perform the duties of a mobile regional sales person. (MOH/SOE 9/22/20, at p. 6:4-6.) In addition, the personal comfort doctrine holds that the course of employment is not broken by certain acts relating to the personal comfort of the employee, as such acts are helpful to the employer in that they aid in efficient performance by the employee. On the other hand, acts which are found to be departures effecting a temporary abandonment of employment are not protected. (*Mission Ins. Co. v. Workers' Comp. Appeals Bd*. (1978) 84 Cal.App.3d 50, 53 [43 Cal.Comp.Cases 889; see also Herlick, California Workers' Compensation Handbook, Ch. 8, § 8.12 (*Matthew Bender*)) This principle holds especially true in cases where the applicant is being paid during the time involved. (*Western Greyhound Lines v. Industrial Acc. Com. (Brooks)* (1964) 225 Cal.App.2d 517; *Rankin v. Workmen's Comp. Appeals Bd*. (1971) 17 Cal.App.3d 857.) Moreover, injuries sustained while the employee is engaged in an activity that has a dual purpose, which serves the business needs of the employer and the personal needs of the employee, occur in the course of employment. (*First Baptist Church of Oroville v. Workers' Comp. Appeals Bd. (Conklin)* (1991) 56 Cal. Comp. Cases 655 (writ den.) (Minister injured in motor vehicle accident after stopping for hospital visit with parishioner on return trip from private family reunion was injured in course of employment).

Based on a review of case law and for the reasons stated in the Report, we agree with the WCJ that the fact that applicant was injured while travelling between two personal errands did not remove him from the course of employment where he had already begun his work day as a mobile salesperson, working out of his employer provided vehicle, while available for any employment related communications, during compensated time. Moreover, we note that the employer allowed personal errands, including the picking up of children. (MOH/SOE 9/22/20, at p. 4:4-8.)

Finally, we note defendant's misplaced reliance on several cases that are distinguishable or not relevant here. In *Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 103, the court found the injury not compensable where the employee, an oil rig driller, was on shore between shifts, not performing any services for the employer, when he drove a company vehicle 140 miles for a purely personal errand.

The question in *Gipson v. Davis Realty Co*. (1963) 215 Cal.App.2d 190, 209-210, a civil liability case, was whether there was reversible error in jury instructions regarding the issue of scope of employment. The civil standard of scope of employment is not applicable to workers' compensation claims where the correct standard is injury arising out of and occurring in the course of employment.

The issue in *Meyer v. Workers' Comp. Appeals Bd*. (1984) 157 Cal.App.3d 1036 [49 Cal.Comp.Cases 459] was whether an injury sustained en route to a voluntary, off-duty activity was compensable.

Defendant also cites to *Lizama v. Workmen's Comp. Appeals Bd*. (1974) 40 Cal.App.3d 366 and *North American Rockwell Corp. v. Workmen's Comp. App. Bd. (Saksa)* (1970) 9 Cal.App.3d 154 to support the statement that "**where the activity is purely for the personal benefit of the employee the injury is not compensable."** (Petition for Reconsideration, at p. 7:8-9, emphasis in original.) However, neither of these cases support that statement. While the holding in *Lizama* was later superseded by statute, the Court of Appeals in that case found an injury compensable where it was sustained, by an employee's use of a saw, on the employer's premises, with express or implied permission after having "punched out," to build a bench for personal comfort use at work. In *Saksa,* the Court of Appeal affirmed the Appeals Board's finding of a compensable injury sustained when the injured worker was struck by a co-worker's automobile in a parking area provided by the employer for use by employees. Neither of these cases supports the legal argument for which defendant cited them.

We admonish defense attorney Stacy Bandhold, with Sion & Associates, that asserting a position that misstates or substantially misstates the law may be found to be a bad faith action or tactic sanctionable pursuant to section 5813. Future compliance with the Appeals Board's rules is expected.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 7, 2021

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

JOHN CHORBAGIAN
PRATT WILLIAMS
SION & ASSOCIATES

PAG/*pc*

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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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

This report and recommendation on petition for reconsideration is being provided to the Appeals Board at this time pursuant to Shipley v. WCAB (1992) 57 CCC 493.

II FACTS

Applicant was involved in a serious automobile accident in his company-provided vehicle on 01/24/2018, Defendant accepted the claim and provided benefits. Later, applicant was deposed and testified that he was in field in his company-provided vehicle performing work for Ormco in servicing orthodontist accounts on 01/24/2018. At some point in the day applicant engaged in a personal errand by stopping at a car dealership. From there he headed to his child's school for pick up. While driving between these two locations applicant was involved the serious vehicle accident and was injured. Based upon this deposition testimony, the defendant then denied the claim and ceased provision of benefits to applicant asserting applicant was engaged in strictly personal errands when the vehicle accident occurred, alleging the various theories set forth at trial and their petition as to why defendant has no liability to provide benefits herein.

At trial it was established through the testimony of defense witness Hurst that the applicant was employed by ORMCO on 01/24/2018 as a senior territory manager. The applicant's job duties required that he perform sales to existing accounts with orthodontists and develop new accounts as well with applicant's territory covering primarily California and Nevada. No fixed office location was provided for the applicant, but instead the employer provided the following tools to applicant: a vehicle, cell phone and an email account. The applicant was expected to respond to any texts or emails through the cell phone/email account throughout the day. If applicant received a text or email while driving, he was expected to pull-over the vehicle and stop before responding to the text or email, or if applicant had a blue tooth connection, applicant could continue to drive and respond to the text/email, as long was such communication while driving complied with State law. (Applicant had such a blue tooth device). The applicant may also make appointments with orthodontists and visit them at their offices or have lunch or dinner meetings with them, as long as such meal-type meetings included an educational component. Additionally, there was no prohibition on applicant engaging in personal errands at the same time he was in the field performing his duties for the employer and that both can occur simultaneously. Witness Hurst also confirmed that applicant did not use the

activity log provided by Ormco to record his daily activities, but instead utilized his own calendar system.

The unrebutted testimony of applicant further established that the employer also provided him with an iPad, a smart phone, and a computer in order to communicate with existing and potential accounts. Also, he was issued a gas card for the company vehicle. He was provided with materials and training information for the orthodontists and his vehicle's trunk and back seat were full of these items. Additionally, he carried in his vehicle product samples of braces, wires, elastic ties and custom products as well as brochures of thousands of products for the orthodontists. The use of this company vehicle and the cell phone were mission critical in doing his job. There was no way he could be away from this smart phone as he served approximately 250 active accounts of which approximately 50 of them were "high-end" important accounts. The goal was to meet the orthodontists' needs to facilitate patient care. If the orthodontist needed some product, they usually needed it "right now." He literally had dozens of contacts per day. In this regard he also made critical use of the iPad. He had this device with him at all times when he was in the company vehicle and it would have been extremely difficult for him to carry out his job duties without it.

Based upon the testimony of both Hurst and the applicant, it was found that the company vehicle as outfitted was for all intents and purposes a mobile office provided by the employer. It was additionally found that the applicant was at the beck and call of the orthodontists throughout the day and was expected to be at the ready to field any/all phone calls, texts and emails, wherever the applicant might be in an immediate manner. In this regard, this WCJ found that as long as applicant had the company provided tools, devices and/or vehicle in his possession he was performing a work function for the benefit of the employer as he was able to timely respond to the various accounts and service them expediently as is the mission of the employer which is both confirmed by the testimony of Hurst and the applicant. The fact that an actual phone call, text or email did not come to applicant during the time between travel from the car dealership and the school did not disconnect the applicant from the concurrent job duties applicant was simultaneously engaged in the course of employment which was being available and able to field calls, texts and emails at a moment's notice from his company vehicle/mobile office utilizing the tools the employer provided him. This was found to be the employer's expectation and is unique to just this employer, as they had established this working environment. Applicant was engaged in work for the employer and was in the course of employment though traveling between the two personal errand locations. Applicant was engaged in both activities at the same time. Therefore, the deviation, if any, during the personal errands was minor and did not take applicant out of the spectrum of performing work duties that benefitted the employer and was therefore in the course of employment at the time the vehicle accident occurred (AOE/COE). Additionally, since applicant was engaged in

both activities at the same time, this falls under the Dual Purpose Rule. Under this rule the deviation is not substantial as the employee is at the precise location required by the employer. When an employee is engaged in a personal errand or activity while also serving the employer's interest, any injury that occurs at that time is within the course of employment. (See: *Price v. WCAB* (1984) 37 Cal. 3d 559).

III
DISCUSSION

It was undisputed that the applicant had been in the field conducting business on behalf of the employer in his company vehicle/mobile office on 01/24/2018. Defendant now disputes this. However, the unrebutted testimony of applicant established he was engaged in employment-related work which additionally included receiving and sending texts, emails and phone calls with orthodontist clients during the day on 01/24/2018.

At some point applicant engaged in a personal errand by going to the car dealership. Once done there, he proceeded to his child's school for pick up. It was during applicant's travels between the two locations when the auto accident occurred on 01/24/2021. Though it appears on the surface that these two activities are strictly personal to the applicant there still remains whether or not the applicant was nonetheless still engaged in activities that benefitted the employer or he had materially deviated from those duties. This WCJ engaged in a careful analysis of the facts. This WCJ determined that based upon the above indicated facts and evidence, this applicant's employment duties with Ormco are rather unique considering he has a mobile office provided by the Ormco and all the special equipment. Calls, texts and emails could and did come to applicant at any time during the normal course of the day and this applicant was on the job in his company vehicle ready to field such calls, texts and emails as he had done on 01/24/2018 before the vehicle accident occurred. Even though applicant was traveling between the car dealership and his child's school at the time the vehicle accident occurred, he nonetheless was in his mobile-office with all the aforementioned employer provided equipment and was ready, willing and able to field calls, texts and emails at a moment's notice as is the duties of the applicant and the employer's expectation. The fact that a call, text or email did not actually come to the applicant at that moment is not the determining factor which is what the defendant focuses on. Even defendant does not contend that if a call, text or email was being responded to by applicant while travelling between the car dealership and the school the claim would not be compensable under the theories they have asserted and rightly so. So, the mere fact applicant was not responding to such calls, texts or emails at the moment the vehicle accident occurred does not bar the claim.

In furtherance of the above was the testimony of defense witness Bryan Hurst. Hurst testified that the position applicant held of Senior Territory

Manager required applicant to perform sales of existing accounts with orthodontists and develop new accounts as well with applicant's territory covering primarily California and Nevada. No fixed office location was provided for the applicant, but instead the employer provided the following tools to applicant: a vehicle, cell phone and an email account. Contrary to the assertions by defendant in their petition, he applicant was expected to respond to any texts or emails through the cell phone/email account throughout the day. If applicant received a text or email while driving, he was expected to pull-over the vehicle and stop before responding to the text or email, or if applicant had a blue tooth connection, applicant could continue to drive and respond to the text/email, as long was such communication while driving complied with State law. The applicant may also make appointments with orthodontists and visit them at their offices or have lunch or dinner meetings with them, as long as such meal-type meetings included an educational component. Additionally, there was no prohibition on applicant engaging in personal errands at the same time he was in the field performing his duties for the employer and that **both can occur simultaneously** and this is what applicant was doing at the time of the vehicle accident.

Applicant's unrebutted testimony further indicated that applicant was provided with materials and training information for the orthodontists and his vehicle's trunk and back seat were full of these items. Additionally, he carried in his vehicle product samples of braces, wires, elastic ties and custom products as well as brochures of thousands of products for the orthodontists. The use of this company vehicle and the cell phone were mission critical in doing his job. There was no way he could be away from this smart phone as he served approximately 250 active accounts of which approximately 50 of them were "high-end" important accounts. The goal was to meet the orthodontists' needs to facilitate patient care. If the orthodontist need some product, they usually needed it "right now." He literally had dozens of contacts per day. In this regard he also made critical use of the iPad. He had this device with him at all times when he was in the company vehicle and it would have been extremely difficult for him to carry out his job duties without it.

Based upon the testimony of both Hurst and the applicant, it is clear that the company vehicle as outfitted was for all intents and purposes a mobile office provided by the employer. It is additionally clear that the applicant was at the beck and call of the orthodontists throughout the day and was expected to be at the ready to field any/all phone calls, texts and emails, wherever the applicant might be in an immediate manner. In this regard, this WCJ found that as long as applicant had the company provided tools, devices and/or vehicle in his possession he was performing a work function for the benefit of the employer as he was able to timely respond to the various accounts and service them expediently as is the mission of the employer which is both confirmed by the testimony of Hurst and the applicant. The fact that an actual phone call, text or email did not come to applicant during the time between travel from the car

dealership and the school does not disconnect the applicant from the concurrent job duties applicant was simultaneously engaged in the course of employment which was being available and able to field calls, texts and emails at a moment's notice from his company vehicle/mobile office utilizing the tools the employer provided him. This was the employer's expectation. Applicant was engaged in work for the employer and in was in the course of employment though traveling between the two personal errand locations. Applicant was engaged in both activities at the same time. Therefore, the deviation, if any, during the personal errands was minor and did not take applicant out of the spectrum of performing work duties that benefitted the employer and was therefore in the course of employment at the time the vehicle accident occurred. Additionally, since applicant was engaged in both activities at the same time, this falls under the Dual Purpose Rule. Under this rule the deviation is not substantial as the employee is at the precise location required by the employer. When an employee is engaged in a personal errand or activity while also serving the employer's interests, any injury that occurs at that time is within the course of employment. (See: *Price v. WCAB* (1984) 37 Cal. 3d 559).

Based upon the above analysis and as set forth in the Opinion on Decision, this WCJ found applicant had not materially deviated from this assigned duties and was engaged in a dual purpose and remained in the course of employment when the vehicle accident occurred. As such, applicant's claim of industrial injury was not barred under the deviation/personal errand doctrine.

Again, though defendant strongly asserts in their petition that this WCJ's finding is an "overwhelming expansion of the law", it is not. The findings of this WCJ are strictly limited to this particular employer who has established this particular work site for applicant by way of the mobile office they supplied him and furthermore allowing the applicant to engage in personal errands while at the same time performing duties for the employer.

IV
RECOMMENDATION

Based on the above discussion it is respectfully recommended that the petition for reconsideration be denied.

DATE: April 28, 2021
MICHAEL T. JUSTICE
WORKERS' COMPENSATION JUDGE