WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CLIFFORD RILEY, *Applicant*

vs.

BOLTHOUSE FARMS; TRAVELERS INSURANCE, *Defendants*

Adjudication Number: ADJ15342092
Bakersfield District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the April 4, 2024 Findings of Fact issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his left upper extremity and left wrist, while employed as an equipment operator on August 9, 2021. The WCJ further found that the injury was not caused by serious and willful misconduct of the applicant. In addition, the WCJ stated, in the Opinion on Decision, that the taking of an unauthorized break did not remove applicant from the course of employment. Pursuant to our authority, we accept defendant's supplemental pleading. (Cal. Code Regs., tit. 8, § 10964.)

Defendant contends that the WCJ erred in finding applicant's injury compensable arguing that applicant abandoned his employment and/or engaged in a material deviation at the time of his injury. Alternatively defendant argues that if applicant's injury is found compensable, that his benefits should be reduced due to his own serious and willful misconduct in violation of Labor Code[1] section 4551. In its supplemental pleading and citing to *Gangwish v. Workers' Comp. Appeals. Bd*. (2001) 89 Cal.App.4th 1284, defendant contends that it is inconsistent with due process that the WCJ supported his decision with a different rationale in the Report than in the Opinion on Decision.

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

We have considered the Petition for Reconsideration, the Answer, defendant's supplemental pleading, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant defendant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

The WCJ provided the following factual background in his Report:

> Applicant, Clifford Riley, age 34 on the alleged date of injury, while employed by WM Bolthouse Farms, insured and administered by Travelers Insurance, claims to have sustained injury on August 9, 2021, to his upper left extremity, particularly left wrist.
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> Applicant started an overnight shift as an Equipment Operator I for the Defendant, Bolthouse Farms, on August 8, 2024, at 10:00 pm, *Summary of Evidence, p.4, 2nd full paragraph*. As the Applicant was a new employee, he did not have a badge yet which would allow him to come to or go from the gated and fenced area of the Defendant's premises without walking to the guard shack, *Summary of Evidence. p. 4, 3rd full paragraph*. Applicant testified that sometime around 8:00 am on August 9, 2024, during his shift, the Applicant and another co-worker began to dose off. At that time another person came by and started yelling at the Applicant. The Applicant did not know who this person was. Applicant responded to this person with "yes sir and no sir", *Summary of Evidence, p.4 3rd full paragraph*.
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> Applicant became angry from the incident and decided to take his break, albeit unauthorized, to go to his car and cool off. There was no other worker at that post when the Applicant left to cool off, *Summary of Evidence, p. 5, 7th paragraph*. Since he did not have a badge and would have to walk a longer distance to leave the secured work area through the guard shack to get to his vehicle *Summary of Evidence. p. 4, 3rd full paragraph*. Applicant took a shorter route to get to his car by climbing the fence near where his vehicle was parked, *Summary of Video of Incident of August 9, 2021, paragraphs 1-4*. As he left his work area, he picked up his lunch pail to take with him for snacks, *Summary of Evidence, p. 8, 4th paragraph*. Applicant walked over to the security fence near where his car was parked on the other side of the fence. He climbed the fence to get to his car. *Summary of Video of incident of August 9, 2021, p. 8, paragraph 2-3*. After climbing to the top of the fence, Applicant fell to the ground in the parking area on the non-security side of the fence, becoming injured, *Summary*

> *of Video of Incident of August 9, 2021, p. 8, 5th paragraph*. He got up and after a few moments of pausing by his van, he got into his van and drove to Kern Medical Center. *Summary of Video of Incident of August 9, 2021, p. 9, paragraphs 1-3, Summary of Evidence, p. 4, 5th full paragraph*,
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> At Kern Medical Center, Applicant was diagnosed with left upper extremity injuries, particularly left wrist, *Defendant's Exhibit C*, p. 1.The Emergency Documentation report of Kern Medical Center, under History of Present Illness, states that "The patient states that after working a 12-hour shift while at work, he became disgruntled with his boss, and wanted to leave work expeditiously, and in order to curtail the walk from his worksite to his car, the patient decided to jump a fence, however subsequently landed on his left arm." *Defendant's Exhibit C, p. 5, first paragraph*. The Emergency Documentation report of Kern Medical Center, under History of Present Illness, also indicates an "acute onset 10/10 in severity consistent in nature left wrist and left elbow pain after a fall.["] *Defendant's Exhibit C, p. 4, last paragraph-p.5, first paragraph*.
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> (Report at pp. 1-3.)

I.

We highlight the following legal principles that may be relevant to our review of this matter:

California has a no-fault workers' compensation system. With a few exceptions, all California employers are liable for the compensation provided by the system to employees injured or disabled in the course of and arising out of their employment, "irrespective of the fault of either party." (Cal. Const., art. XIV, § 4.) The protective goal of California's no-fault workers' compensation legislation is manifested "by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.'" (Lab. Code, §§ 3351, 5705(a); *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354 [54 Cal.Comp.Cases 80.)

Notwithstanding the above, section 3600 imposes liability on an employer for workers' compensation benefits only if its employee sustains an injury arising out of and in the course of employment (AOE/COE). An employer is liable for workers' compensation benefits, where, at the time of the injury, an employee is "performing service growing out of and incidental to his or her employment and is acting within the course of employment." (Lab. Code, § 3600(a)(2).) The determination of whether an injury arises out of and in the course of employment requires a two-

prong analysis. (*LaTourette v. Workers' Comp. Appeals Bd*. (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].)

First, the injury must occur "in the course of employment," which ordinarily "refers to the time, place, and circumstances under which the injury occurs." (*LaTourette, 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 permits him to do." (*Id*.) In other words, if the employment places an applicant in a location and he or she was doing an activity reasonably attributable to employment or incidental thereto, an applicant will be in the course of employment and the injury may be industrially related. (*Western Greyhound Lines v. Industrial. Acc. Com. (Brooks)* (1964) 225 Cal.App.2d 517 [29 Cal.Comp.Cases 43].)

Second, 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 326, 329].)

Generally, the employment relationship begins/ends when the employee enters/exits the employer's premises ("premises line" rule), although injuries sustained in close proximity to the employer's premises may also arise out of the employment. (*General Ins. Co. v. Workers' Comp. Appeals Bd*. (1976) 16 Cal.3d 595, 598 [41 Cal.Comp.Cases 162] ("*Chairez*"); *Hinojosa v. Workmen's Comp. App. Bd*. (1972) 8 Cal.3d 150, 157 [37 Cal.Comp.Cases 734]; *Lewis v. Workmen's Comp. App. Bd*. (1975) 15 Cal.3d 559, 561, quoting *California Casualty Indem. Exchange v. Industrial Acci. Com.* (1943) 21 Cal.2d 751, 754, 1943 Cal. LEXIS 306].) If the employment places an applicant in a location and he or she was doing an activity reasonably attributable to employment or incidental thereto, an applicant will be in the course of employment and the injury may be industrially related. (*Brooks, supra,* 225 Cal.App.2d 517.)

Furthermore, "Acts of 'personal convenience' are within the course of employment if they are 'reasonably contemplated by the employment.'" (*Price v. Workers' Comp. Appeals Bd*. (1984) 37 Cal.3d 559, 568 [49 Cal.Comp.Cases 773]; *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd (Makaeff)* (1977) 69 Cal.App.3d 170, 176 [42 Cal.Comp.Cases 297]; *Vogt v. Herron*

Construction (2011) 200 Cal.App.4th 643, 132 Cal. Rptr. 3d 683.) "[A]cts 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." (*Price, supra*, 37 Cal.3d at 567-68 (citations omitted).) Thus, even if an employee is 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. The "personal comfort" doctrine applies to situations where the employee is compensated during the time of the injury, or where the injury occurs on the employer's premises, or where the employee is performing a special service to the employer. (*Mission Ins. Co. v. Workers' Comp. Appeals Bd.* (1978) 84 Cal.App.3d 50, 54 [43 Cal.Comp.Cases 889); *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.)

Once applicant has met their initial burden of proof, the burden shifts to defendant to prove, by a preponderance of evidence, a non-connection or deviation from an injured worker's job duties or an unauthorized departure from the course of the employment. (Lab. Code, § 5705; *Rockwell International v. Workers' Comp. Appeals Bd. (Haylock)* (1981) 120 Cal.App.3d 291 [46 Cal.Comp.Cases 664]; *City of Los Angeles v. Workers' Comp. Appeals Bd. (Rivard)* (1981) 119 Cal.App.3d 633 [46 Cal.Comp.Cases 625]; *Pacific Tel. & Tel. Co. v. Workers' Comp. Appeals Bd*. (1980) 112 Cal.App.3d 241 [45 Cal.Comp.Cases 1127].)

In this case, defendant has also raised an issue related to the holding in *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284 [66 Cal.Comp.Cases 584] and that the rationale provided by the WCJ in the Opinion on Decision is different from the rationale in the Report. Based on our initial review, we require further time to determine the applicability of *Gangwish* and also to determine whether the record supports the WCJ's determination that applicant was engaged in an activity reasonably contemplated by his employment.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

II.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com*. (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd*. (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075

[65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra,* at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

III.

Accordingly, we grant defendant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 24, 2024

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

CLIFFORD RILEY
CHAIN COHN CLARK
MICHAEL SULLIVAN & ASSOCIATES

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