WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAIRO BUSTAMANTE, ***Applicant***

vs.

COMMUNITY WARRIORS 4 PEACE
insured and administered by
CHURCH MUTUAL INSURANCE COMPANY
Defendants

Adjudication Number: ADJ16148307
Anaheim 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 and Opinion on Decision, which we adopt and incorporate, we will deny reconsideration.

In order to be compensable, an injury must arise out of and occur in the course of employment (AOE/COE). (Lab. Code, §3600.) The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing 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.) To determine whether an injury is AOE/COE, we look to the nature of the act and the nature of the employment, the custom or usage of the employment, the terms of the employment contract, and "other factors." (*Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 568 [49 Cal.Comp.Cases 772] (*Price*); *North American Rockwell Corp. v. Workmen's Comp. App. Bd.* (1970) 9 Cal.App.3d 154, 158 (*Saska*) [35 Cal.Comp.Cases 300].) Labor Code section 3600(a) states that liability will exist "without regard to negligence."

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 [67 Cal.Comp.Cases 51].) 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] (*LaTourette*).)

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, at 645.) If a worker is injured while doing an *activity reasonably attributable to employment* or incidental thereto, they will be in the course of employment and the injury may be industrially related. (*Western Greyhound Lines v. Ind. 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, [however], the injury need not be of a kind anticipated by the employer nor peculiar to the employment in the sense that it would not have occurred elsewhere." (*Employers Mut. Liability Ins. Co. v. Industrial Acci. Com.* (*Gideon*) (1953) 41 Cal.2d 676, 679-680.) "[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, 736 [48 Cal.Comp.Cases 326].)

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.*)

Here, as set forth by the WCJ, applicant demonstrated that his claimed injury arose out of and in the course of employment. Applicant credibly testified that when he was shot, he was at the location due to his employment and was engaged in his regular job duties, and he credibly testified that he did not know why he was shot. Once applicant provided that evidence, the burden shifted to defendant.

Defendant put forth *no* evidence to support its allegation that applicant's injury did not arise out of employment. Instead, it asked that an inference be drawn that because applicant was

the only victim, it meant that he was "targeted." (Petition for Reconsideration, p. 2, lines 15-16.)[1] In the absence of any other evidence as to the "why," applicant's credible testimony that he did not know why he was shot was sufficient to meet his burden to show that the injury arose out of his employment. Accepting defendant's contention would require applicant to prove a negative in order for his claim to be compensable, and we conclude that the contention lacks merit.

We agree with defendant that the "special risk" / "zone of danger" analysis may not apply here and generally applies to circumstances where it is not clear whether a claimed injury is industrially caused, such as when an applicant is commuting or away from their regular place of employment. Thus, like here, if applicant is in the normal course of their employment and the injury arose out of that employment, and with no evidence that the reason for the assault was personally motivated, it is not necessary to consider whether applicant had a greater risk of injury than any other person at the time of the injury. Here, applicant testified that he was handing out PPE equipment at the time of his injury at the fundraiser, one of his usual duties of his employment, and hence he met his burden to show that he was in the course of his employment and that his injury arose out of employment.

Accordingly, we deny the Petition for Reconsideration.

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[1] In support of its arguments, defendant's sole legal authority was a citation to *County of San Bernardino v. Workers Compensation Appeals Bd.*, (*Tuttle*) (1997) 62 Cal. Comp. Cases 605, 609 (Cal. App. 4th Dist. January 22, 1997), an unpublished opinion of the Court of Appeal. California Rule of Court 111.5 states in relevant part that:

> (a) **Unpublished opinion** Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.
>
> (b) **Exceptions** An unpublished opinion may be cited or relied on:
> (1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or
> (2) When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 9, 2024

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

JAIRO BUSTAMANTE
GOLDMAN MAGDALIN
MELINE VARGAS

LN/md

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Date of Injury:	March 24, 2022
Age on DOI:	26
Parts of Body:	Chest, Left Upper Extremity, Left Leg, and Low Back
Identity of Petitioner:	Defendant, Community Warriors 4 Peace insured and administered by Church Mutual Insurance Company
Timeliness:	The petition was timely filed on June 10, 2024
Verification:	The petition was verified
Date of Findings:	May 29, 2024

Petitioner's Contentions: Petitioner contends the WCJ erred by finding that the applicant sustained an injury arising out of employment using neutral risk and special risk-zone of danger when he was assaulted while in the course of employment.

II
FACTS

On March 24, 2022 applicant, Jairo Bustamante, while working as a Community Health Worker for defendant Community Warriors 4 Peace at a community car wash in the Koreatown neighborhood of downtown Los Angeles, was shot approximately 7 to 11 times by two assailants (Summary of Evidence, March 24, 2022 Trial, page 4, lines 4 to 23). Applicant "sustained 5 gunshot wounds to his left chest, one gunshot wound to his left leg[,] which resulted in [a] broken femur, and one gunshot wound to his lower back" (Joint Exhibit 3, page 94).

Defendant, through their attorney of record, filed a Declaration of Readiness to Proceed to a Priority Conference on October 4, 2023 to address whether Applicant's injury arose out of and in the course of employment. Applicant timely objected to the Declaration of Readiness to Proceed stating further discovery was required and requesting the hearing be converted to a Mandatory Settlement Conference. Two Priority Conferences were held, and the matter was set for Trial on injury arising out of and in the course of employment. The matter proceeded with witness testimony and was submitted on March 5, 2024. The issue submitted for decision was whether the Applicant sustained an injury arising out of and in the course of his employment with Defendant.

On May 29, 2024, the court issued its Findings of Fact, finding that the applicant did sustain an injury arising out of and in the course of employment to his chest, left upper extremity, left leg, and low back. Defendant's timely petition for reconsideration followed, asserting that the court erred by finding that the applicant sustained an injury arising out of employment using neutral risk and special risk-zone of danger. Defendant did not seek reconsideration of the court's finding that Applicant's injury occurred in the course of employment.

III
DISCUSSION

Labor Code §3600 reads, in part, that "[l]iability for the compensation provided by this division … shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of … employment …" (Lab. Code, § 3600 (Deering, Lexis Advance through the 2024 Regular Session Ch 9).)

A. Third Party Assault

Defendant contends that Applicant did not meet his burden of proving that the March 24, 2022 assault arose out of employment as the motive behind the assault is unknown, there is a reasonable inference that Applicant was targeted, and his employment did not play a role in the assault. The purpose of the neutral risk doctrine is that the nature of the harm to the injured employee is unknown. There was no need to make any inferences, reasonable or otherwise, as there was ample evidence of a neutral risk of harm. Applicant's employment did play a role in the assault as his employment took him to the place where he was harmed.

Liability will rest with an employer if one or more of their employees are assaulted by a third party whether on the employer's premises or not depending on the nature of the risk, or rather the character of the harm. The risks fall into three categories, industrial, personal, and neutral. "The source of injury may be classified as neutral either when the nature of the harm is not related to the employment or to the employee personally or when the nature of the harm may be simply unknown. The rule is that when an employee at the place and in the period of his employment is injured by some neutral harm, the injury is compensable on the theory that his employment took him to the place of harm." (*Clemmens v. Workers' Comp.Appeals Bd.* (1968) 33 Cal. Comp. Cases 186)

"An assault in the course of employment committed for an unknown motive or for no motive connected with the employee's personal life arises out of the employment and is compensable. In the complete absence of any evidence establishing either a personal motive or an employment-related risk, the fact that the injury was inflicted in the course of employment should result in compensability under the positional risk doctrine" 1 CA Law of Employee Injuries & Workers' Comp § 4.53 (Citing *State Compensation Ins. Fund v. W.C.A.B. (Vargas)* (1982) 47 Cal. Comp. Cases 729; see *Rogers v. W.C.A.B.*

(1985) 50 Cal. Comp. Cases 550; *Western Airlines v. W.C.A.B.* (1984) 49 Cal. Comp. Cases 344)).

Applicant presented testimony and evidence that the motive, if any, behind the actions of the third-party assailants who shot him on March 24, 2024 are unknown and that the shooters themselves were unknown to him. Applicant credibly and persuasively testified at trial that he "did not recognize the names of the people who shot him," "does not know if the assailants were in a gang," "never [saw] them before," "does not know why the attack happened," "does not know why he was shot," and "his shooting was not gang related." (Summary of Evidence, March 5, 2024 Trial, page 4, lines 24-25, page 5, lines 1-2 and 11-12). During his recorded statement, Applicant referred to the shooting as a "random attack" (Joint Exhibit 2, page 1), and stated he "didn't see who did it" (Joint Exhibit 2, page 2). When interviewed by officers from the Los Angeles Police Department (LAPD) while in the hospital on the day of the shooting, Applicant stated "he did not see the suspects and did not know why he might have been targeted" (Joint Exhibit 3, page 93 and page 99).

The follow-up investigation report of the LAPD, found at Joint Exhibit 3, pages 155 to 159, includes the questioning of the assailants. The driver of the vehicle involved in the shooting stated that he was given turn-by-turn instructions and did not provide a motive for the shooting (Joint Exhibit 3, page 156). The front passenger seat shooter provided inconsistent statements that included being in the area and simply hearing the gun shots, that he was looking for a place to eat while driving and heard gun shots, he then stated he got out of the car to say hello to someone named "Husky." There was an attempt to clarify the statement from the front passenger seat shooter by the LAPD officers (Joint Exhibit 3, page 156). The rear passenger seat shooter also provided inconsistent statements to the LAPD. He initially stated that the three occupants of the vehicle parked and exited the vehicle to get something to eat when they heard the gun shots. He then stated that he was in a different vehicle and met with a fourth person, Angel, at a nearby liquor store, and that he wasn't even in the vehicle with the driver and front seat passenger (Joint Exhibit 3, pages 156- 157). All three of the men pled Nolo Contendere and were found guilty of attempted murder. At no point did any of the men, in the evidence presented to this Court, provide a motive for the shooting that injured Applicant or that they even knew him.

Applicant sustained his burden by demonstrating that he did not know the men that shot him, he did not know of any motive for the shooting, and the lack of motive in the LAPD records. Applicant is not required to prove that the employment affirmatively played a role in the assault, he only needed to prove that his employment took him to the place of harm. Defendant failed to present any rebuttal testimony or evidence of an industrial or personal motive for the shooting. In cases like this, where the risk of injury is not related to the employment or the employee, or the nature is unknown, the injury to the Applicant is found to have arisen out of employment and compensable.

B. Special Risk-Zone of Danger

Defendant contends that the special risk-zone of danger exceptions only apply to cases involving the going and coming rule. This contention ignores the ability of the courts to extend concepts to other similar instances. For purposes of this case, Applicant's employment placed him in locations that presented a greater risk of harm than that of the general public. The fact that he was not going to or coming from work does not negate the special risk of working in geographical areas that present high risk of harm.

An injury to an employee that occurs outside of the employer's premises may still be deemed compensable if the employee is in a "zone of danger," due to the employment. The test for the special risk exception is found in *General Insurance Co. of America v. WCAB* (*Chairez*), 41 CCC 162 (1976) and, specifically for assaults that occur in the "zone of danger," in *Parks v. WCAB*, 48 CCC 208 (1983).

The first part of the test is a simple "but for" analysis. In the case at hand, but for being told to work at the car wash fundraiser by his supervisor, Applicant would not have been there and been injured when he was shot.

The second part of the test is whether the risk that the employee is put in is greater than that of the public in general. "[T]he decisions indicate the causal connection with work is established when the employment requires the employee to be in what turns out to be a place of danger. The risk of harm does not have to be foreseeable, nor does it have to be one peculiar to the employment in the sense that it would not have occurred elsewhere. The risk does not have to be one within the employer's control or connected to the employer, nor one to which the general public is not also exposed. It is sufficient if the work brings the employee within the range of peril by requiring his or her presence there when it strikes" (1 CA Law of Employee Injuries & Workers' Comp § 4.61 (citing *Industrial Indem. Co. v. I.A.C. (Baxter)* (1950) 15 Cal. Comp. Cases 20; *Pacific Indemnity Co. v. I.A.C. (Raymond)* (1948) 13 Cal. Comp. Cases 173; *California Comp. & Fire Co. v. W.C.A.B. (Schick)* (1968) 33 Cal. Comp. Cases 38; *Madin v. I.A.C. (Richardson)* (1956) 21 Cal. Comp. Cases 49)).

Applicant credibly and persuasively testified that he is a former gang member, that he began working for different non-profit organizations to provide services to the community and gang intervention after being released from prison. He testified that the work required him to enter "hot zones," which he described as high-risk communities with gang activity in places such as Koreatown in downtown Los Angeles (Summary of Evidence, March 5, 2024 Trial, page 3, lines 14-25). He testified that at the time of his injury he was a Community Health Worker passing out COVID kits in highly active gang areas and that "the

regular community service people would not go into the highly dangerous areas" but that he could go into those dangerous areas due to his connection with the community and working for Community Warriors 4 Peace (Summary of Evidence, March 5, 2024 Trial, page 4, lines 4-12 and page 5, lines 14-15).

Applicant further credibly testified that Community Warriors 4 Peace was aware of the danger to the workers in the community. The employer did have meetings regarding the risks in the hot zones (Summary of Evidence, March 5, 2024 Trial, page 5, line 23-24). He testified that community organizations would have a "License to Operate" within gang territory and is a term used in the community to determine if you can go into the gang territory (Summary of Evidence, March 5, 2024 Trial, page 5, lines 24-25).

Applicant sustained his burden by demonstrating that he did face a greater risk than that of the general public when he worked in gang hot zones for defendant Community Warriors 4 Peace and but for his work for defendant, he would not have been at the car wash fundraiser where he was shot multiple times, thereby sustaining a compensable injury.

IV
RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied in its entirety.

Date: June 29, 2024

Amy Godfrey
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE