WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JAVIER HERNANDEZ, ***Applicant***

vs.

CEJA REYES, INC.;
ZENITH INSURANCE COMPANY, ***Defendants***
Adjudication Number: ADJ16567838
Redding 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, including the transcripts for the hearings on March 4 and March 5, 2024, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

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

May 29, 2024

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

JAVIER HERNANDEZ
THE LAW OFFICE OF ARASH KHORSANDI, PC
CHERNOW, PINE & WILLIAMS
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN
CEJA REYES, INC.
HAIGHT, BROWN & BONESTEEL, LLP

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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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

1.	Applicant's Occupation:	Farm Labor
2.	Applicant's Age:	40
3.	Date of Injury:	5/26/2022
4.	Parts of Body Alleged Injured:	Right leg, brain, head and spine
5.	Manner of Injury:	Auto accident
6.	Identity of Petitioner:	The defendant is the petitioner.
7.	Timeliness:	The petition was timely filed.
8.	Verification:	The petition was properly verified.
9.	Date of Findings of Fact, and Orders	3/25/24

10. Petitioner's Contentions: Petitioner contends that the Going and Coming Rule bars applicant's claim for benefits. Petitioner argues that neither the Special Risk Exception nor the Dual Purpose Exception to the Going and Coming Rule apply to the facts of the case.

II.
FACTS

Applicant's claimed injury arises out of an auto accident that occurred while he was on his way home from work, riding in a car pool van with ten or eleven other people. At the time of the accident, the van was driven by the son of the organizer of the van pool (Summary of Testimony, 3/4/24, page 8:8-9). This driver had no valid driver's license, and the van being used was not legally certified to be used as a farm labor vehicle (Defendant's Exhibit E, page 27).

The applicant himself was employed by defendant Ceja Reyes, who was in the business of providing farm and agricultural laborers to businesses that needed them.

Defendant hired the applicant to work as a laborer at a location that was about sixty miles away from his home, even though the applicant did not have a driver's license or car, and in fact did not know how to drive.

In spite of the fact that their business was providing dependable workers for agricultural businesses, defendant made it clear from the beginning of the applicant's employment that it did not have anything to do with the way the applicant got to work, even though in applicant's case there was no obvious way he could deliver himself to the workplace on his own.

Nevertheless, defendant simply expected the employees to somehow show up on time for work (Summary of Testimony, 3/5/24, page 3:17-19). Another of defendant's employees arranged as a side business a van pool to deliver the workers to the work site (Summary of Testimony, 3/5/24, page 3: 14-17). The workers each paid the driver of the van about 10 dollars a day (Summary of Testimony, 3/4/24, page 4:19). The worker who organized this van pool arrangement did so independently of the employer, although to motivate other workers to use the van pool, this worker

represented himself as a supervisor for the defendant, even though defendant never hired or paid him as such (Summary of Testimony, 3/5/24, page 3: 9-21).

Defendant's actual supervisor at the Westside location, Ramon Alvarran, told the workers that the van owner was in charge of them when they were using the van (Summary of Testimony, 3/4/24, page 8: 10-14). The van driver would pick up each worker at their home, and take them to the work site, park the van there, and then deliver them back to their homes after the work of the day had been completed (Summary of Testimony, 3/4/24, page 4: 18-19; 23-24). During the entirety of the applicant's work with defendant, he was transported from his home to the same work location, namely Westside Transplant, and then home again at the end of the workday (Summary of Testimony, 3/4/24, page 5: 4-5; 9-19; page 7: 10-11). Defendant's supervisor at the Westside location, Mr. Alvarran, observed the workers being delivered to the work site, and once he saw that they had arrived, assigned each worker his duties (Summary of Testimony, 3/4/24, page 5: 11-14).

Therefore, although defendant denied any legal control or involvement in this pool, the defendant was well aware of it and enjoyed a significant benefit from it.

At trial, the parties submitted the question of whether the applicant's case was barred by the Going and Coming Rule. The Findings of Fact and Opinion on Decision issued on 3/25/24, finding that the applicant's case was not barred by the Going and Coming Rule. The Petition for Reconsideration was then filed by defendant, who disagreed with this determination.

III.
DISCUSSION

An injury which occurs on the way to or from work is not covered by the workers' compensation system if it is a local commute from the workers' home to and from a fixed place of business at fixed hours, and in the absence of special or extraordinary circumstances. **Hinojosa v. WCAB (1972) 8 Cal. 3d 150.**

Addressing the Special Risk Exception to the Going and Coming Rule, the Petitioner agrees that the Supreme Court created a two pronged test to determine whether this exception should apply in **General Ins. Co. v. WCAB (1976) (Chairez) 16 Cal. 3d 595**, at page 601.

Specifically, the exception will apply if:

1. "But for" the employment, the employee would not have been at the location where the injury occurred.
2. The risk is distinctive in nature, or quantitatively greater than risks common to the public.

In this case, the Petitioner hired the applicant to work at a location sixty miles from his home, in spite of the fact that the applicant did not know how to drive, had no car, and did not have a driver's license. Thus, there is no way under these facts that the applicant could have engaged in the type

of commute contemplated by Hinojosa, supra, and the commute was also in no way a "local" commute, being about sixty miles from the applicant's home, one way.

This situation required the applicant to take extraordinary action to ensure he could make it to work on time, everyday, and get home afterwards. This extraordinary action was to participate in a van pool organized by another employee, and in which ten or eleven other of Petitioner's workers also participated in.

Thus, this was the employment related condition that created the special risk. The applicant would never have been in a van coming home from work, at the location where the accident took place, but for the special conditions of this employment.

As discussed in the Opinion on Decision, in two cases, **Gredanus v. IAC (1965) 63 Cal. 2d 490**, and **Pacific Indem. Co. v. IAC (Henslick) 28 Cal. 2d 329**, it was held that the mere act of having to make a left turn across traffic into the employer's premises exposed the employee to a particular risk, distinctive in nature, not shared by the general public, sufficient to invoke the Special Risk Exception.

Here, the Petitioner's decision to hire a worker that had no way to get to work on his own required him to make special arrangements for a van pool that by its very nature exposed him to a particular risk, distinctive in nature, not shared by the general public.

Specifically, he was required to be on the road longer, for more miles, on a different route than he would have taken were this the "local commute from a workers' home to a fixed place of business at fixed hours" contemplated by **Hinojosa**. Further, the applicant was riding in a van that was not legally registered as a farm labor vehicle, and driven by a person, on the day of the accident, that did not possess a valid driver's license.

All these were unique and special risks created by the Petitioner in hiring a person who could not drive, had no car, and had no driver's license, and who needed to reliably be at work on time sixty miles away from his home. These facts are far more significant than those found in **Gredanus** and **Pacific Indemnity**, supra, to be sufficient to invoke the Special Risk Exception. Further, sixty miles one way is well beyond the "local commute" as defined in **Hinojosa** to be required for the proper use of the Going and Coming Rule.

The case cited by Petitioner in support of their position actually supports the use of the Special Risk Exception in our case.

In **Freire v. Matson Navigation Co. (1941) 19 Cal 2d 8**, the worker had to take a taxi to meet the ship he was hired to work on (analogous to having to take a van pool to get to the workplace in our matter). On exiting a taxi onto the bulkhead in front of the embarcadero, another driver ran over his foot. Petitioner agrees that in that case, the employer created the hazard because it was the only practical means of access to the employer's premises, and the hazard was directly connected to the employment.

Yet, in our case, the Petitioner also created the hazard by hiring someone to work at a location sixty miles from his home, but without any means to get to work on his own. Due to this, the applicant had to arrange for alternative transportation, which in this matter was the van pool he shared with ten or eleven other workers, and during the use of which he came to be at the specific location of the accident. Thus, in both **Freire** and our case, the employer created the hazard that resulted in the accident.

In summary, the facts and circumstances of our case meet both the tests set forth by the Supreme Court in **General Ins. Co.**, supra, in that "but for" the employment, the applicant would never have had to make special arrangements to get to work, and those arrangements brought him to the location of the accident that caused his injury.

Further, the risks involved were by their nature distinctive and quantitatively greater than the risks common to the general public.

Moving to the application of the second exception to the Going and Coming Rule, namely the **Dual Purpose Exception**, it is agreed that when an employee is engaged in a personal act off premises while also serving in some way the employer's interests, any injury that then occurs arises out of and within the course of employment.

This was further defined in **Bramall v. WCAB (1978) (Dunnington) 43 CCC 288**, where the board noted that when deciding whether an employee's actions fall within the dual purpose rule, the relative weight of the personal and business motives is immaterial; it is sufficient that the business purpose was a concurrent motivation for the employee's action.

Here, Petitioner argues that the applicant's trip home in the van pool, which is what he was doing at the time of the accident and injury, served no business purpose, and was presumably by this argument wholly a personal endeavor. This blatantly ignores the fact that the Petitioner's business was the business of reliably providing agricultural laborers to the entities that needed them. Petitioner's business would suffer and likely fail if they did not succeed in doing this. Thus, it is absurd that they now argue that the van pool that its employees used to present themselves for work at a location that was sixty miles from a non-driving workers' home, day after day, and for as long as their labor was needed, did not serve their business purposes. Further, their on site manager was aware of this arrangement, and he was able to meet these employees at their arrival and efficiently assign their work duties to them all at once, as opposed to if they had arrived individually, a clear benefit to the employer in the form of management efficiency.

Petitioner argues that if this exception were allowed to apply under these facts, every commute would become AOE/COE. This argument, however, ignores the fact that **Hinojosa** defines a normal commute as "a local commute from the workers' home to a fixed place of business at fixed hours, and in the absence of special or extraordinary circumstances." The facts of our case establish that the necessity for the van pool, which the Petitioner caused by hiring workers who could not physically or legally drive sixty miles to the worksite, are the special and extraordinary circumstances contemplated by this language. Therefore, Petitioner's concern is not credible.

In summary, both the Special Risk and the Dual Purpose exceptions to the Going and Coming Rule apply, and the injury that occurred while the applicant was on his way home in the van pool is compensable.

IV.
RECOMMENDATION

For the reasons discussed above, it is respectfully recommended that the Petition for Reconsideration be denied in its entirety.

Date: 5/1/24

Curt Swanson
Presiding Workers' Compensation Judge