

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

RICHARD SCHLESINGER, *Applicant*

vs.

**GOVERNOR'S OFFICE OF BUSINESS & ECONOMIC DEVELOPMENT (GO-BIZ);
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ16642865
Van Nuys District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the August 7, 2024 Findings of Fact and Order Taking Off Calendar (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed on August 1, 2022 as a motion picture analyst, sustained an injury arising out of and in the course of employment (AOE/COE).¹

Defendant contends that applicant sustained the alleged injury during an unpaid lunch break and cites to case law indicating that "the employer-employee relationship is considered to be suspended" during the lunch period since the employer "does not pay for the employee's services during the break, and the employee provides no benefits in return." (Petition for Reconsideration (Petition), p. 2.) As such, defendant believes there was no injury AOE/COE.

We have not received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

¹ Specific body parts were not indicated within the F&O as findings regarding the nature and extent of injury were deferred.

We have considered the Petition, the contents of the Report, and have reviewed the record in this matter. Based upon our review of the record, we will grant the Petition and affirm the August 7, 2024 F&O, except that it will be amended to clarify applicant sustained injury AOE/COE to the cervical, thoracic, and lumbar spine. The issue of injury to other body parts will be deferred.

FACTS

Applicant claims to have sustained an injury arising out of and in the course of employment to the musculoskeletal system (chest/ribs), back, head, and psyche while employed on August 1, 2022 as a motion picture analyst for defendant. Applicant was apparently physically assaulted by a stranger around 3:30 p.m. while taking a break at a business across the street from his employer.

Defendant contends applicant was on an off premises unpaid lunch break at the time of the alleged injury and therefore his injury was not AOE/COE. Applicant contends he was on a paid work break.

Dr. Sam Bakshian was ultimately selected as the orthopedic panel Qualified Medical Evaluator (QME) and evaluated the applicant on November 11, 2023.

In his January 17, 2023 report, Dr. Bakshian deferred his findings on causation and impairment but noted that “if the trier of fact were to conclude as true and factual per the applicant’s history that he was not at lunch, rather on a break at 3:30 pm in the afternoon, then industrial causation would be indicated.” (Exhibit 1, QME report of Dr. Bakshian, January 17, 2023, p. 17.)

In the same report, Dr. Bakshian diagnosed applicant with the following:

1. Post-traumatic aggravation, cervical spine strain with history of prior ACDF C-3-C4 per John Regan, M.D. in 2017 (pending medical records for review).
2. Thoracic spine sprain/strain with multilevel spondylosis.
3. History of multiple rib fractures, right sided eighth and ninth.
4. Lumbar spine strain with multilevel degenerative disc disease and multilevel spondylosis.
5. History of staggered gait, positive Clonus and Hoffmans, inability to perform Romberg and Tandem gat secondary to balance disorder and generalized weakness, comment deferred to neurologist specialist.
6. 8/1/22 – Status Post Work related injury/assault employment as an Analyst/Tax credit department worker for Go-Biz with alleged injuries involving the cervical spine and lumbar spine.

(*Id.*, pp. 14-15.)

Dr. Bakshian also found the following “objective factors of disability” for the cervical, thoracic, and lumbar spine:

Cervical Spine:

1. Well healed surgical scar, anteriorly.
2. Tenderness with spasm.
3. Decreased range of motion as measured.
4. Positive Clonus and Hoffmans, positive Romberg and Tandem gait.
5. 4/5 weakness of the upper extremities.
6. Staggered gait.
7. Radiographic findings of ACDF C3-4, multilevel moderate to severe degenerative disc disease, C6-7 C7-T1, moderate at C4-5, C5-6.

Thoracic Spine:

1. No tenderness no spasm.
2. Full and complete range of motion as measured.

Lumbar Spine:

1. Tenderness with spasm.
2. Decreased range of motion as measured.
3. Normal motor and sensory examination of both lower extremities. Radiographic evidence of multilevel degenerative changes.

(*Id.*, p. 18.)

On June 18, 2024, the parties proceeded to trial on the issue of AOE/COE and whether applicant was on a paid or unpaid break at the time of the alleged injury.

DISCUSSION

I.

Preliminarily, former Labor Code section² 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:

² All further statutory references are to the Labor Code unless otherwise noted.

- (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.

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 under the Events tab 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 on August 26, 2024, and 60 days from the date of transmission is October 25, 2024. This decision is issued by or on October 25, 2024, 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, it was served on August 26, 2024, and the case was transmitted to the Appeals Board on August 26, 2024. 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 August 26, 2024.

II.

Turning to the Petition, it is well established that 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.) Whether an injury arose out of and in the course of employment is generally a question of fact to be determined based upon the circumstances of each case. (*Wright v. Beverly Fabrics* (2002) 95 Cal.App.4th 346, 353 [67 Cal.Comp.Cases 51].) For an injury to be considered as one arising out of employment, it must occur as 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 the connection need not be the sole cause, a contributory cause is sufficient. (*Maher v. Workers’ Comp. Appeals Bd.* (1983) 33 Cal.3d 729 [48 Cal.Comp.Cases 326].)

The phrase “in the course of employment” “ordinarily refers to the time, place, and circumstances under which the injury occurs.” (*Latourette v. Workers’ Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [63 Cal.Comp.Cases 253].) 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.” (*Id.*) “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.) “[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*, at 567–568.)

Thus, even if an employee is doing something purely personal at the time of injury, the employee may be considered performing services incidental to employment within the meaning of section 3600. This is 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.) Conversely, an injury which occurs during an unpaid break, particularly if off premises, is less likely to be considered AOE/COE. (*Mission Ins. Co. v. Workers’ Comp. Appeals Bd.* (1978) 84 Cal.App.3d 50, 53-57;

County of Los Angeles v. Workers' Comp. Appeals Bd. (Swift) (1983) 145 Cal.App.3d 418, 421; *Hinkle v. Workers' Comp. Appeals Bd.* (1985) 175 Cal.App.3d 587.)

In the instant case, applicant left defendant's premises to take an unrestricted break. This was an act of personal convenience that should have been reasonably contemplated by defendant. With respect to whether the break was paid or unpaid, we note that in his Opinion on Decision (OOD), the WCJ indicated that based upon the "totality of the evidence," including applicant's credible testimony, employer testimony, and evidence pertaining to food and drink purchases made by applicant (including the timing of those purchases), it was apparent that applicant was on a paid break. (OOD, p. 3.) There were two purchases made August 1, 2022, and both appeared "relatively similar in price. (*Id.*) "[N]o singular purchase appeared to be a "more expensive" lunch purchase. (*Id.*) The time of day when the injury occurred also appeared to be "more compatible with a normal afternoon break." (*Id.*) In light of the foregoing, we agree that at the time of injury, applicant was on a paid work break rather than an unpaid lunch.

Defendant argues that applicant's testimony is inconsistent with the evidence. As noted above, however, the WCJ found applicant's testimony credible and "more specific and certain" than that offered by the employer. (OOD, p. 3.) Pursuant to *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500], credibility determinations of the WCJ, as the trier of fact, are entitled to great weight based upon the WCJ's opportunity to observe the demeanor of the witnesses and weigh the witnesses' statements in connection with their manner on the stand. Credibility determinations are not to be disturbed except where there is contrary evidence of considerable substantiality. (*Id.*) No such evidence was provided here.

With respect to findings of injury AOE/COE, at least one body part is to be identified. (Lab. Code, § 3600(a); *Clark, supra*, at pp. 291, 297-298.) An AOE/COE finding without a body part creates confusion as to defendants' obligations regarding the advancement of benefits. It is generally understood that "[a]wards of the board 'are subject to those general legal principles which circumscribe and regulate the judgments of all judicial tribunals.' [Citations.] Accordingly, they must be sufficiently certain to permit enforcement..." (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 557 [47 Cal.Comp.Cases 145].)

Here, the WCJ found injury AOE/COE but deferred his findings regarding nature and extent. Fortunately, however, we can turn to the medical evidence for assistance. In the instant case, QME, Dr. Bakshian, diagnosed applicant with "post-traumatic aggravation" of a cervical

spine strain as well as “sprain/strain” of the thoracic and lumbar spine as a result of the subject injury. (Exhibit 1, pp. 14-15.) As further support, Dr. Bakshian outlined “objective factors of disability,” including findings of tenderness with spasm, decreased range of motion, multilevel degenerative changes, gait problems, and upper extremity weakness. (*Id.*, p. 18.)

In light of the foregoing, we believe there is substantial medical evidence of injury AOE/COE for the cervical, thoracic and lumbar spine. At trial, applicant raised the issue of AOE/COE to his head, back, and chest/ribs. Although a history of rib fractures was noted by Dr. Bakshian, it is not entirely clear whether he concluded that the fractures were caused by the injury. With respect to applicant’s gait issues, Dr. Bakshian has deferred to a neurologist. Thus, we will not consider and will defer the issue of whether applicant sustained injury to other body parts.

Lastly, we highlight the fact that 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 is 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 original petition for reconsideration.

Accordingly, we grant applicant’s Petition and affirm the August 7, 2024 F&O, except that it will be amended to clarify that applicant sustained injury AOE/COE to the cervical, thoracic, and lumbar spine. The issue of injury to other body parts will be deferred.

For the foregoing reasons,

IT IS ORDERED that defendant’s Petition for Reconsideration of the August 1, 2022 Findings of Fact and Order Taking Off Calendar is **GRANTED**.

IT IS FURTHER ORDERED that as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 1, 2022 Findings of Fact and Order Taking Off Calendar is **AFFIRMED** except that it is **AMENDED** as follows:

STATEMENT OF FACTS

1. Applicant, Richard Schlesinger, born [], while employed in Los Angeles, California by Governor's Office of Business & Economic Development (Go-Biz), on August 1, 2022 as a motion picture analyst, sustained injury arising out of and in the course of employment to the cervical, thoracic, and lumbar spine. The issue of injury to other body parts is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 24, 2024

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

**RICHARD SCHLESINGER
MY INJURY HEADQUARTERS
STATE COMPENSATION INSURANCE FUND**

RL/cs

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

CS