WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ERNEST WINSLOW, *Applicant*

vs.

CITY OF ALAMEDA, PSI,
administered by LWP CLAIMS SOLUTIONS, *Defendants*

Adjudication Number: ADJ18298511, ADJ16041068, ADJ16041077
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Order (F&O) issued by a workers' compensation administrative law judge (WCJ) on November 21, 2025. The WCJ found that applicant sustained an injury arising out of and in the course and scope of his employment (AOE/COE), while employed on September 1, 2023 as a maintenance worker in Alameda, California by the City of Alameda.

Defendant contends that although applicant may have been acting in the benefit of the employer by retrieving the employer's truck in working order, he stepped outside of the employment relationship at the moment he decided to stop the stolen vehicle by pulling in front of it and putting the two vehicles, passengers, and public in danger; and, that the WCJ failed to look at how applicant's duty to his employer was carried out which are the facts with the most legal significance pursuant to *Valenzuela v. Workers' Comp. Appeals Bd.* (1993) 59 Cal.Comp.Cases 4.

Applicant filed an Answer and Opposition to Defendant's Petition for Reconsideration (Answer). Defendant filed a Petition for Leave to File Response to Answer to Petition for Reconsideration and a Response to Answer to Petition for Reconsideration (Supplemental Pleading). We accept the Supplemental Pleading.

The WCJ filed a Report and Recommendation on Defendant's Petition for Reconsideration and Notice of Transmission to the Reconsideration Unit of the Appeals Board (Report), recommending denial of the petition.

We have reviewed the record in this matter, the allegations of the Petition for Reconsideration, the Answer, and the Supplemental Pleading. We have considered the contents of the Report. For the reasons set forth below, we deny reconsideration.

I.

Former Labor Code section 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, Labor Code section 5909 was amended to state in relevant part that:

> (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.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code 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 in Events 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 February 28, 2025, and 60 days from the date of transmission is April 29, 2025. This decision is issued by or on April 29, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 and Recommendation by the workers' compensation administrative law judge, the Report was served on February 28, 2025 and the case was transmitted to the Appeals Board on February 28, 2025. 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on February 28, 2025.

II.

Defendant's contentions at trial are the same as those on reconsideration. (Report, at p. 5.) The gravamen of defendant's contention on review is that applicant was injured while engaged in "an unauthorized departure from the course of employment," i.e., blocking the path of a stolen employer truck with another employer vehicle, and not, as determined by the WCJ, while performing his duties "in an unauthorized manner." (*Westbrooks v. Workers' Comp. Appeals Bd.* (1988) 203 Cal.App.3d 249, 253 [53 Cal.Comp.Cases 157] ("*Westbrooks*"); *Williams v. Workers' Comp. Appeals Bd.* (1974) 41 Cal.App.3d 937 [39 Cal.Comp.Cases 619] ("*Williams*").) Injury caused by the former conduct is not compensable, while the latter conduct, although it "'may constitute serious and willful misconduct by the employee (Lab. Code, § 4551), does not take the employee outside the course of his employment. [Citations.]' (citations)" (*Ibid.*)

We disagree with defendant and agree with the WCJ's finding that applicant sustained injury AOE/COE. The facts in this case do not appear to be disputed:

> As summarized in the F&O with Opinion on decision dated November 21, 2024, at pp. 3-6, the relevant facts in this case are largely undisputed and the subject of this appeal, like the issue at trial, is primarily a legal one. What follows is a slightly abridged version of that summary. This case was tried on August 15, 2024, without testimony, and submission was delayed at the parties' joint request, to allow them to submit Post-Trial Briefs. (Minutes of Hearing (MOH) dated 8/15/24.) Those respective briefs were filed and considered in addition to Trial Briefs that both parties had filed, and the matter was submitted as of August 29, 2024. The facts summarized below are taken primarily from the admitted evidence and the general discussion in those briefs.

The Applicant was a 22-year employee of City of Alameda, who worked as a maintenance worker. He sustained accepted industrial injuries in 2019 and 2021 as a city employee (I believe those cases are the companion case numbers listed on the defendant's Petition and Response to Applicant's Answer), and at the time of this injury in this case, was working modified duty related to those claims in the city's fleet department, located at the city garage. That modified duty included driving and moving city vehicles around. On September 1, 2023, he parked a city pickup truck in the front of the garage, leaving the key inside, and went to open the garage door. At that point, a man on the street jumped into the truck and drove away, stealing it. The Applicant witnessed this with his foreman, Art Robbins. (Joint 107 at pp. 13-15.) At that point, Mr. Winslow, on his own initiative, jumped in another city vehicle and gave chase. However, due to heavy traffic, he described the chase/drive as "slow." (*Id*. at pp. 19-21.) Art Robbins called the police from the garage to report the theft. (*Id*. at pp. 28, 30.) In the course of this low speed chase, the Applicant at one point drove into opposite lanes of traffic while attempting to pass the stolen truck. (*Id*. at p. p. 31.) He eventually got ahead of the stolen truck after about 10 or 15 minutes (Joint 107 at p. 21), and pulled in front of the stolen truck perpendicularly at an intersection, in an effort to block further flight. (*Id*. at p. 22.)

Unfortunately, at that point, the suspect in the stolen truck intentionally rammed the right front passenger side of Applicant's truck, in T-bone fashion and pushed the truck through the intersection. (Id. at pp. 23-25.) The Applicant was in his truck at the time and was wearing his seatbelt, and airbags did not deploy. It was this collision [that] gave rise to the claimed injuries on that date. Despite the collision, Applicant continued to pursue the fleeing truck, but after the suspect left Alameda Island over the Park Street Bridge, he gave up, and returned to the city garage in the damaged truck. (*Id*. at pp. 25-27.) There is a police report from Officer Adam Digusto of the Alameda police department dated September 1, 2023, in evidence related to the entire incident. (Joint 101.) However, the Applicant was not cited for any traffic violations, civil or criminal.

Applicant submitted a DWC-1 claim form the same day alleging work related injuries. (Joint 106.) The claim was denied by LWP in a notice dated September 27, 2023, on the basis the injury was sustained outside the course of employment and "was not proximately caused by the employment." (Joint 105.) Initial medical treatment, before the denial, was at Kaiser Occupational on September 8, 2023, for neck and back complaints. Although the claim was later denied (Joint 105), as a practical matter, the Applicant continued to receive medical treatment for his neck and low back, because he had existing and accepted prior workers' compensation claims to those body parts for his earlier injuries on March 4, 2021 and April 1, 2019. (See Stipulation No. 4 in MOH at p. 2.) Eventually, Applicant was eventually evaluated by pain management QME, Jordan Newmark, M.D., who issued a report dated December 8, 2023, which addresses 3 different dates of injury, including the one in this case. (Joint 101.) At the time of this exam, the Applicant was not working, evidently because the

> employer could not accommodate the PTP's work restrictions in the accepted injury claims, and Dr. Newmark appears to find injury to the cervical spine and lumbar spine for this date of injury, which was not P&S, with temporary work restrictions deferred to the PTP. (*Id*. at pp. 4, 39-40.)
>
> Since the Applicant's chase of a fleeing thief, especially because it involved potentially dangerous and/or reckless driving, violated city policy and procedures, the City sought to discipline Mr. Winslow for his conduct. That included a Skelly hearing conducted by the Alameda City Fire Chief, Nicholas Luby, who issued a report dated October 12, 2023. (Joint 103.) Pursuant to the recommendation of the Chief, the City issued an order of discipline in the form of a letter/notice from Erin Smith, Public Works Director, dated November 20, 2023, based on findings that he misused and/or wasted a city vehicle, and did not operate a city vehicle in a safe and law abiding manner at all times and in accordance with the law. (Joint 104.) The ordered discipline was a 7-day suspension without pay, which had been Chief Luby's recommendation in his Skelly hearing report. (*Id*. at p. 4.)

(Report, pp. 3-5.)

Defendant appears to concede the WCJ's determination that applicant's job duties included driving an employer provided vehicle to deliver tools to job sites, and that applicant's perception of his duty to retrieve the truck was "reasonable." (Petition for Reconsideration, p. 6.)

> In blocking the stolen vehicle in such a way that he could not avoid damaging it and the vehicle he was driving, *he engaged in an unauthorized departure from the course of his employment.* As such, the trial judge erred in considering applicant's final actions immediately before and at the time of collision were in the course of his employment. They were not in the course of employment.

(Petition for Reconsideration, p. 6.)

In the Supplemental Pleading, defendant reiterates this position, stating:

> Here the purpose of applicant's chase after the stolen vehicle was to make sure that the vehicle was protected, kept track of, and restored to the employer. *The moment applicant turned his vehicle into the path of the stolen vehicle, he went beyond the course of his employment, by causing damage to both vehicles.* The act causing the damage was not for the benefit of the employer and takes his final action out of the course of employment. Applicant had been in the course of employment during the chase up to that point as he was trying to keep track of the stolen vehicle. The moment he veered into the path of the stollen [*sic*] vehicle, he ceased being in the course of his employment.

(Supplemental Pleading, pp. 1-2.)

We also concur with the WCJ that applicant was engaged in the course of his employment while attempting to retrieve the truck assigned to him by the employer to perform his job duties.

> *Westbrooks* notes that the course of employment is defined by "such service as the employee is expected to render." (*Westbrooks* at p. 159) **([Opinion]** at pp. 8-9.) To me, this brings in the expectations and beliefs of the Applicant into consideration. It appears clear to me that the Applicant in this case was not chasing the thief as part of a personal agenda and/or for reasons unrelated to his employment, but rather because he felt a duty and/or obligation in an effort to safeguard and/or protect and/or to help return the city's stolen property. That motivation was noted by Chief Luby in his recommendation after the *Skelly* hearing to impose less than the requested discipline sought by the city, i.e. a suspension of 7 days without pay rather than 14. (Joint Exhibits 103 and 104.)
> . . .
> In my view, **it is clear from the evidence that the Applicant tried to passively block the stolen vehicle by placing his own truck in front of the stolen truck when it was stopped at an intersection. He did not ram or attempt to ram or collide with the vehicle. It was the thief who intentionally rammed the Applicant in his truck, and pushed it through the intersection, again fleeing the scene. The Applicant did not seek or intend to cause damage to one or both vehicles, which I think is an important distinction, and I am not persuaded that when he tried to obstruct the stopped stolen truck at the intersection that he somehow, at that last second stepped outside the course or scope of his employment as argued by the defendant.**
>
> As noted in the Opinion at p. 9, there is lots of caselaw standing for the proposition that an employer is presumed to receive a benefit from the performance of an employee's work, even if it performed contrary to stated policies or standard procedures. In this case, I do not think that what the Applicant's actions which he acknowledges in his deposition testimony were "instinctive" and/or "reactive" (Joint 107 at p. 23, line 18), are or were so outside the course of his employment duties, which included driving and taking care of city vehicles, that it should be deemed an unauthorized departure from his job duties, with the effect any injury associated with that activity is non-compensable for workers' compensation purposes. I believe this conclusion is also consistent with the analysis and spirit of the holdings in the *Westbrooks* . . .cases, and that the defendant's efforts to distinguish them legally or factually fall flat. To the extent that a determination regarding this AOE/COE analysis at some point requires a determination of whether a certain line was crossed, I also considered the directives of liberal interpretation and application of workers' compensation law, as reflected in Labor Code section 3202, and cases such as *Dimmig v. Workman's Comp. Appeals Bd*. (1972) 6 Cal. 3d 860, 866-867, 36 Cal.Comp.Cases 621, and *Lujan v. Workers' Comp. Appeals. Bd.* (1985) 175 Cal. App. 3d 212, 216-217, 50 Cal.Comp.Cases 693.

(Report, pp. 6-7, 9-10, bold added.)

Further, defendant's argument that applicant was acting within the course of his employment so long as his actions did not risk the safety of his employer's vehicle is referred to as the doctrine of "added risk," and "has been repudiated in this state." (*Williams, supra*, 41 Cal.App.3d at p. 943.)

> The doctrine urged by petitioner must be applied with extreme caution for the reason that it is barely distinguishable from the rules of contributory negligence and assumption of risk which are not applicable in compensation cases. Indeed it may well be asserted that the doctrine of "added risk", that is, where an employee assumes a risk greater than that usually incident to his employment, he cannot recover, cannot be followed in California because it is in effect nothing more than contributory negligence. (Campbell, Workmen's Compensation, vol. 1, sec. 238; California Constitution, art. XX, sec. 21.)

(*Associated Indem. Corp. v. Industrial Acci. Com*. (1941) 18 Cal.2d 40, 46 [1941 Cal. LEXIS 329].)

Defendant relies heavily on *Valenzuela v. Workers' Comp. Appeals Bd.* (1993) 59 Cal.Comp.Cases 4, an Appeals Board panel decision.[1] *Valenzuela* is not binding and may be contrary to binding appellate case law. (See *Westbrooks, supra; Williams, supra*.) A panel decision that we find more relevant and persuasive is *Barrett Business Services, Inc. v. Workers' Comp. Appeals Bd. (Manser)* (2020) 85 Cal.Comp.Cases 651 (writ den.).

> On the evening that the injury occurred, Applicant was driving his taxicab in San Francisco when he became involved in what began as a verbal altercation with the driver of a Mercedes. The exchange escalated to an assault, during which Applicant was beaten with a baseball bat after exiting his taxi to allegedly photograph the Mercedes. The entire incident was captured on the taxi's dash cam footage.
> . . .
>
> Defendant denied Applicant's workers' compensation claim, asserting that the injury stemmed from a "personal grievance" between Applicant and the other driver, that Applicant was not engaged in work-related services at the time of the incident, and that Applicant substantially deviated from his job duties by exiting his vehicle and engaging with the other driver. Defendant also argued that Applicant's injuries were caused by his own S&W misconduct.

[1] Panel decisions are not binding precedent. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) A California Compensation Cases digest of a "writ denied" case is also not binding precedent. (*MacDonald v. Western Asbestos Co*. (1982) 47 Cal.Comp.Cases 365, 366 [Appeals Bd. en banc].) While not binding, panel decisions and writ denied decisions may be considered to the extent their reasoning is persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc).)

. . .

> On the issue of whether Applicant engaged in S&W misconduct justifying a decrease in his workers' compensation benefits pursuant to Labor Code § 4551, Defendant argued that Applicant intentionally and willfully engaged in and instigated a road rage incident that he knew or reasonably could have foreseen would lead to injuries, and that he acted in reckless disregard of the possible consequences by failing to leave the scene. According to the WCJ, however, Applicant's conduct, while perhaps lacking good judgment, did not rise to the level of wanton and reckless disregard of the possible danger necessary to establish S&W misconduct.
>
> The WCAB accepted the WCJ's credibility determinations and, adopting and incorporating the WCJ's report, denied reconsideration.

(*Manser, supra*, 85 Cal.Comp.Cases at p. 654.)

In *Manser*, and arguably in this case, the applicant was injured as a result of another person's violent action and/or assault that arose out of the employment – and not as a result of a personal grievance that originated outside the employment and "followed" the applicant to the jobsite.

> Defendant cites the case of *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Vargas)* (1982) 133 Cal. App.3d 643, 184 Cal. Rptr. 111, to support its position that the assault did not arise out of and occur in the course of employment. In *Vargas*, it was held that where an injury results from a personal grievance between an employee and a third party, it does not arise out of the employment if the assault occurred at work merely by chance. However, **if the nature and performance of the employee's duties contributed to or facilitated the commission of the assault, then the injury is compensable regardless of the assailant's personal motivation.** *California Comp. and Fire Co. v. Workers' Comp. Appeals Bd. (Schick)* (1968) 68 Cal. 2d. 157, 161 [65 Cal. Rptr. 155, 436 P.2d 67, 33 Cal. Comp. Cases 38].) The *Vargas* case, *supra*, does not support defendant's contentions. **In the instant matter, it is clear that the nature and performance of applicant's job duties facilitated the commission of the assault, because those job duties placed applicant in a position where he encountered the driver who assaulted him. Had applicant not been driving his cab, the assault would not have occurred.** This is not a case where a personal grievance which occurred outside of applicant's employment "followed him" to work, such that the work environment served merely as a stage for applicant to be assaulted.

(*Manser, supra,* 85 Cal.Comp.Cases at pp. 653-654, bold added.)

Accordingly, applicant was acting within the course of his employment by attempting to retrieve the employer's vehicle for his employer's benefit. Therefore, applicant's resulting injury arose out of and in the course of his employment and is compensable. (*Williams, supra,* 41 Cal.App.3d at pp. 940-941; *Westbrooks, supra,* 203 Cal.App.3d at pp. 253-254.) We therefore affirm the WCJ's decision and deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued by a workers' compensation administrative law judge on November 21, 2025 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 29, 2025

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

ERNEST WINSLOW
FRANCO MUNOZ, ESQ.
LAUGHLIN, FALBO, LEVY & MORESI, LLP

AJF/mc

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