WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NORMAN MILLER, *Applicant*

vs.

DEPARTMENT OF CORRECTIONS,
legally uninsured, adjusted by
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ18137953
Riverside District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O) issued on November 18, 2024 by a workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant was traveling to work in a private van during his regular commute; that his claim was barred by the going and coming rule; that there were no facts to support an exception to the going and coming rule; and, that the applicant participated in an alternative commute program and thus his claim is barred by Labor Code[1] section 3600.8. In pertinent part, the WCJ ordered that applicant take nothing by reason of his claim.[2]

Applicant contends that any reasonable doubt regarding whether an injury arises out of and in the course of employment must be resolved in his favor (Lab. Code, § 3202, *Tingey v. Industrial Acci. Com.* (1943) 22 Cal.2d 636, 641; *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 733 [48 Cal.Comp.Cases 326]); and, that the exceptional commute/required vehicle exception to the going and coming rule should be applied in this case to find that the injuries he sustained while traveling to work in a vanpool used exclusively for CDCR employees at Ironwood State Prison, are compensable (*Hinojosa v. Workers' Comp. Appeals Bd.* (1972) 8 Cal.3d 150 [37

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

[2] The WCJ also found that applicant's claim is not presumed compensable pursuant to section 5402, and admitted certain evidence into the record. These issues are not raised on reconsideration and we will not address them.

Cal.Comp.Cases 734] (*Hinojosa*), *Smith v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 814, and *Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031 [82 Cal.Comp.Cases 692] (*Zhu*)). Applicant contends that the coverage bar in section 3600.8, subdivision (a), should not be applied to commute trips by state employees riding in private vanpool vehicles utilized, although not owned by defendant, to transport employees to desolate, remote work sites such as Ironwood State Prison, where the State exercises some level of control over the employees while riding in the vanpool vehicles.

Defendant filed an Answer to Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the petition be denied.

We have reviewed the record in this matter, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Opinion on Decision and Report. For the reasons set forth in the Opinion on Decision (except for those portions related to issues not raised for reconsideration) and Report, which we adopt and incorporate herein, and for the reasons set forth below, we deny reconsideration.

I.

Former 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, 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.
>
> (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 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 December 16, 2024, and 60 days from the date of transmission is Friday, February 14, 2025. This decision is issued by or on Friday, February 14, 2025 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 and Recommendation by the workers' compensation administrative law judge, the Report was served on December 16, 2024, and the case was transmitted to the Appeals Board on December 16, 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 December 16, 2024.

II.

Section 3600.8 states

> (a) **No employee who voluntarily participates in an alternative commute program that is sponsored or mandated by a governmental entity shall be considered to be acting within the course of his or her employment while utilizing that program to travel to or from his or her place of employment,** *unless he or she is paid a regular wage or salary in compensation for those periods of travel*. An employee who is injured while acting outside the course of his or her employment, or his or her dependents in the event of the employee's death, shall not be barred from bringing an action at law for damages against his or her employer as a result of this section.
>
> (b) **Any alternative commute program provided, sponsored, or subsidized by an employee's employer in order to comply with any trip reduction mandates of an air quality management district or local government shall be**

> **considered a program mandated by a governmental entity**. **An employer's reimbursement of employee expenses or subsidization of costs related to an alternative commute program shall not be considered payment of a wage or salary in compensation for the period of travel**. If an employer's salary is not based on the hours the employee works, payment of his or her salary shall not be considered to be in compensation for the period of travel unless there is a specific written agreement between the employer and the employee to that effect. *If an employer elects to provide workers' compensation coverage for those employees who are passengers in a vehicle owned and operated by the employer or an agent thereof, those employees shall be considered to be within the course of their employment, provided the employer notifies employees in writing prior to participation of the employee or coverage becoming effective.*
>
> (c) As used in this section, "governmental entity" means a regional air district, air quality management district, congestion management agency, or other local jurisdiction having authority to enact air pollution or congestion management controls or impose them upon entities within its jurisdiction.
>
> (d) Notwithstanding any other provision of law, *vanpool programs may continue to provide workers' compensation benefits to employees who participate in an alternative commute program by riding in a vanpool, in the case in which the vanpool vehicle is owned or registered to the employer.*
>
> (e) *Employees of the state who participate in an alternative commute program, while riding in a vanpool vehicle that is registered to or owned by the state, shall be deemed to be [w]ithin the course and scope of employment for workers' compensation purposes only.*

(Cal Lab Code § 3600.8, emphasis added.)

Section 3600.8 was enacted on September 17, 1994 as part of Senate Bill 1360 (SB 1360). (1994 Cal ALS 622; 1994 Cal SB 1360; 1994 Cal Stats. ch. 622.) SB 1360 was enacted to encourage employees to use alternative transportation methods for their work commute in order to support air pollution control districts compliance with transportation control and vehicular occupancy programs. (See https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml, Off. of Sen. Floor Analysis, August 30, 1994 Analysis of Sen. Bill No. 1360 (1994 Reg. Sess.) as introduced January 31, 1994.) The bill therefore excluded from gross income tax any benefits or reimbursement paid to employees for using alternative transportation methods, *except* actual hourly wages or salary, and excluded any injuries sustained while using alternative transportation methods from workers' compensation coverage *unless* the employee was being paid their wage or salary for the commute

time. (*Ibid.*)[3] The only exceptions to this workers' compensation coverage ban are for injuries sustained in *employer registered or owned* vanpool vehicles (Lab. Code, § 3600.8(d)),[4] and for state employees riding in a *state registered or owned* vanpool vehicle (Lab. Code, § 3600.8(e)). (*Ibid*.)

"However, that employee who is injured shall not be barred from suing the employer for negligence." (*Ibid*., enacted in Lab. Code, § 3600.8(a).) Thus, SB 1360 also included requirements for vanpool vehicle owners to maintain liability insurance protection for personal injury and property damage under the Public Utilities Code. (See Footnote 2, *supra*.)

Section 3600.8 applies only to an "alternative commute program that is sponsored or mandated by a governmental entity..." (Lab. Code, § 3600.8(a).) "Governmental entity" is defined in two ways in the statute, only one of which is relevant in this matter: "Any alternative commute program provided, sponsored, or subsidized by an employee's employer in order to comply with any trip reduction mandates of an air quality management district or local government shall be considered a program mandated by a governmental entity." (Lab. Code, § 3600.8(b).)

Here, it is not disputed that applicant was a state employee injured while voluntarily riding in a private vanpool vehicle during his ordinary commute to work for his regular shift, and that his employer, the State of California, reimbursed him for participating in that alternative commute program. (Petition for Reconsideration, pp. 2-3.) In addition, defendant produced evidence that it provided its employees, including applicant, with non-taxable "vanpool incentives...to reduce the

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[3] SB 1360 also included Public Utilities Code section 5392.3 [requiring liability insurance protection for charter-party carrier of passengers contracted with employers to provide vanpool vehicles for employee commutes as described in Revenue and Taxation Code section 17149]; Revenue and Taxation Code section 17149 [excluding from gross income compensation or fair market value of employment benefits received by employees for participation in ridesharing for their regular work commute, and defining "ridesharing arrangement"]; and, Vehicle Code section 16020.3 [requiring an employer that owns a vanpool vehicle per Revenue and Taxation Code section 17149(c)(1) to maintain evidence of financial responsibility for bodily injury or death and/or property damage as a result of accident per Public Utilities Code section 5391.2]. (1994 Cal ALS 622; 1994 Cal SB 1360; 1994 Cal Stats. ch. 622.)

[4] We note that the majority in the writ denied panel decision of *Jarvis v. Workers Compensation Appeals Bd., Southern California Gas Co.* (1998) 63 Cal.Comp.Cases 1289, appeared to ignore subdivision (d) when it found applicant's claim barred by section 3600.8, even though there was substantial evidence that the employer *did own* the vanpool vehicle. (*Id.*, at p. 1291.) The dissenting commissioner did not agree that section 3600.8 barred applicant's recovery in *Jarvis*. (*Ibid.*) Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels or workers' compensation judges. (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, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Bd. en banc).) We do not find the reasoning of the majority decision in *Jarvis* to be persuasive.

number of vehicles on the road by encouraging employees to explore and use alternative means of transportation to commute to and from work. Fewer vehicles on the road means an improvement in air quality and less traffic congestion." (Def. Exh. C, p. 1; Def. Exh. D, p. 2.)

We find no evidence in the record to rebut defendant's evidence, and applicant appears not to dispute that the vanpool commute is covered by section 3600.8. Instead, applicant contends that section 3600.8 should not apply for the following reasons:

> The State of California enacted Labor Code §3600.8 to protect itself from worker's compensation litigation when state employees in metropolitan areas were using various means of mass transit such as buses, trains, subways to comply with the Executive Order by Governor Deukmejian. Here, none of those mass transit options are available in this remote desolate area of Blythe thus Labor Code §3600.8 should not apply. Under Labor Code § 3202 this Court owes a duty to extend the benefits of persons for the protection of employees injured in the course of their employment. Here, the direct control and direct benefits of the vanpool to the State of California create an undeniable extension of the workplace while employees are participating in the vanpool.

(Petition for Reconsideration, p. 10.)

However, section 3600.8, subdivision (a), does not bar applicant's claim in this case by invoking the going and coming rule. Instead, subdivision (a) removes one of the "necessary conditions of compensation" under section 3600, subdivision (a)(2), by finding as a matter of law that he was *not* acting within the course of his employment while voluntarily participating in defendant's alternative commute program. (Lab. Code, § 3600(a)(2) [employee *must be acting within course of employment* to meet condition of compensation]; Lab. Code, § 3600(a) [liability for employee injuries "shall...exist against an employer for any injury...arising out of *and in the course of the employment*..."], emphasis added.)

In other words, the only way to establish an employer's liability is to establish that an employee was acting in the course of their employment at the time of the injury. Section 3600.8, subdivision (a), literally removes the ability of an injured employee from establishing that condition of compensability, and the only exceptions to this clearly stated bar to compensation are included in section 3600.8:

> - "No employee who voluntarily participates in an alternative commute program that is sponsored or mandated by a governmental entity shall be considered to be acting within the course of his or her employment while utilizing that program to travel to or from his or her place of employment, **unless he or she is paid a regular wage or salary in compensation for those periods of travel..."** (Lab. Code, § 3600.8(a), emphasis added.);

- "If an employer elects to provide workers' compensation coverage for those employees who are passengers in a vehicle **owned and operated by the employer or an agent thereof**, those employees shall be considered to be within the course of their employment, **provided the employer notifies employees in writing prior to participation of the employee** or coverage becoming effective." (Lab. Code, § 3600.8(b), emphasis added.)

- "...vanpool programs may continue to provide workers' compensation benefits to employees who participate in an alternative commute program by riding in a vanpool, in the case in which the vanpool vehicle is **owned or registered to the employer**." (Lab. Code, § 3600.8(d), emphasis added.)

- "Employees of the state who participate in an alternative commute program, while riding in a vanpool vehicle that is **registered to or owned by the state**, shall be deemed to be [w]ithin the course and scope of employment for workers' compensation purposes only." (Lab. Code, § 3600.8(e), emphasis added.)

In this case, and as set forth by the WCJ in the Opinion on Decision and Report, applicant did not produce substantial evidence to support any of these delineated exceptions, and therefore his claim is barred by section 3600.8, subdivision (a). (Opinion on Decision, p. 3.)

Accordingly, we deny reconsideration and affirm the WCJ's decision that applicant's injury is barred by section 3600.8, subdivision (a), and that applicant produced no evidence to establish any of the exceptions to that bar as delineated in section 3600.8.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued on November 18, 2024 by a workers' compensation administrative law judge is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 13, 2025

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

NORMAN MILLER
WALTER CLARK LEGAL GROUP
STATE COMPENSATION INSURANCE FUND
STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS-IRONWOOD

AJF/abs

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

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ18137953

NORMAN MILLER	**-vs.-**	**DEPT OF CORRECTIONS IRONWOOD, DEPT OF CORRECTIONS IRONWOOD,**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: **Eric Yee**

DATE: **November 18, 2024**

OPINION ON DECISION
[Labor Code section 5313]

This case proceeded to trial on September 16, 2024; it continued and submitted on October 8, 2024, after completion of two additional witnesses.

The parties requested post-trial briefs which both parties filed. Applicant's brief, filed on October 25, 2024, asserts the claim is compensable and presumed compensable. Defendant filed their brief on October 23, 2024; defendant asserts the claim is barred by statute, there are no exceptions to the going and coming rule, and the denial of the claim was timely issued.

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STIPULATED FACTS

The parties stipulated to the following facts:

Applicant, Norman Miller, age 47, while employed on June 9, 2023, as a Correctional Officer, at Riverside County, California, by Department of Corrections, Ironwood, claims to have sustained injury arising out of and in the course of employment to abdomen, back, chest and legs.

At the time of the injury, the employer was legally uninsured, adjusted by State Compensation Insurance Fund.

The parties stipulated that AOE/COE was the sole issue for trial, bifurcated the liens and allowed the CHP collision report into evidence. The court allowed the additional issue of whether the case is presumed compensable according to Labor Code section 5402, subsection (b)(1).

On the second day of trial, the parties further stipulated to the following:

> 1. The documents submitted as defense Exhibits C and D (Cal HR Commute Program Info & Cal HR Commute Program Frequently Asked Questions) are true and accurate representations of documents as they appear on www.Calhr.ca.gov. The State's vanpool subsidy program is open to Bargaining Unit 6 employees.
>
> 2. The applicant participated in the State's vanpool incentive subsidy program. The driver submitted certification requirements for the month of June 2023 (certification listed as Applicant's Exhibit 15). The certification was approved, and the applicant was reimbursed $65 as part of the vanpool subsidy program for June 2023. The $65 was listed in the applicant's MOU section 14.07, pages 115,116 of MOU for period 7-3-20 to 7-2-23 (Defense Exhibit G- MOU, Applicant's Exhibit 13).

The issues are:

1. AOE/COE;
    a. Going and coming rule;
    b. Vanpool per Labor Code section 3600.8 et seq.;
2. Liability of self-procured medical treatment;
3. Attorney fees; and,
4. Presumption of compensability according Labor Code section 5402.

AOE/COE

The going and coming rule precludes compensation for an injury suffered during the course of a local commute to a fixed place of business at fixed hours in the absence of exceptional circumstances. (*Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal. 3d 150, 157 [104 Cal. Rptr. 456, 501 P.2d 1176].)

For purpose of the rule, the employment relationship does not begin until an employee enters the employer's premises. Prior to entry, the going and coming rule ordinarily precludes recovery; after entry, injury is generally presumed compensable as arising in the course of employment. (*Pacific Indem. Co. v. Industrial Acc. Com.* (1946) 28 Cal. 2d 329, 336.

There are exceptions to the general rule, but none apply in this case as discussed below.

The court in *General Ins. Co. v. WCAB (Chairez)* (1976) 41 CCC 162 described a two-prong test for finding a special risk: (1) but for the employment the injured worker would not have been at the location where the injury occurred, and (2) the risk was distinctive from that of the public generally.

In this case, the motor vehicle accident occurred on a public road, applicant was passenger in a private vehicle that was being utilized for a state vanpool subsidy program. The applicant testified that he was on his commute to and from work. Nothing in the route or the conditions during that route were any different than any other driver on the road at that time. Applicant has not shown that his travel from work subjected him to any risk that is distinctive in nature or quantitatively greater than risks common to the public or that the employer's premises in any way contributed to the creation of such risk. Applicant's commute and resulting motor vehicle accident fall within the "going and coming" rule and his injury is not a compensable work injury.

Another exception to the rule is a special mission or errand that encompasses a performance or service outside an employee's regular duty.

If an employee performs an errand for the benefit of an employer while the employee is commuting, then the employee's tortuous or negligent conduct is within the scope of her or his employment from the time the employee begins the errand to the time he or she returns from the errand or completely abandons the errand for personal reasons. (See *Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1057.) An example of a special errand would be employees traveling after attending a work-related conference funded by the employer (*Jeewarat v. Warner Bros. Entertainment Inc.* (2009) 177 Cal.App.4th 427, 436.)

There are no facts to support that applicant was on a special mission or errand; the accident occurred during the applicant's regular commute to and from work.

Labor Code section 3600.8 states:

> (a) No employee who voluntarily participates in an alternative commute program that is sponsored or mandated by a governmental entity shall be considered to be acting within the course of his or her employment whiles utilizing that program to travel to or from his

or her place of employment, unless he or she is paid a regular wage or salary in compensation for those periods of travel. An employee who is injured while acting outside the course of his or her employment, or his or her dependents in the event of the employee's death, shall not be barred from bringing an action at law for damages against his or her employer as a result of this section.

(b) Any alternative commute program provided, sponsored, or subsidized by an employee's employer in order to comply with any trip reduction mandates of an air quality management district or local government shall be considered a program mandated by a governmental entity. An employer's reimbursement of employee expenses or subsidization of costs related to an alternative commute program shall not be considered payment of a wage or salary in compensation for the period of travel. If an employer's salary is not based on the hours the employee works, payment of his or her salary shall not be considered to be in compensation for the period of travel unless there is a specific written agreement between the employer and the employee to that effect. If an employer elects to provide workers' compensation coverage for those employees who are passengers in a vehicle owned and operated by the employer or an agent thereof, those employees shall be considered to be within the course of their employment, provided the employer notifies employees in writing prior to participation of the employee or coverage becoming effective.

(c) As used in this section, "governmental entity" means a regional air district, air quality management district, congestion management agency, or other local jurisdiction having authority to enact air pollution or congestion management controls or impose them upon entities within its jurisdiction.

(d) Notwithstanding any other provision of law, vanpool programs may continue to provide workers' compensation benefits to employees who participate in an alternative commute program by riding in a vanpool, in the case in which the vanpool vehicle is owned or registered to the employer.

(e) Employees of the state who participate in an alternative commute program, while riding in a vanpool vehicle that is registered to or owned by the state, shall be deemed to be within the course and scope of employment for workers' compensation purposes only.

In this case, the applicant was in a vanpool vehicle that was owned by a private individual or company called Samuki Enterprises according to Exhibit 15. The van was not registered to or owned by the State, but rather Walter Johnson of Beaumont according to the police report that identified the van as vehicle number 2 (Exhibit L).

This van would travel from the Walmart parking lot to the prison and back. (MOH/SOE Trial Day 1, 9/16/24, p. 16-17.) And based on applicant's testimony and the police report (Exhibit L), the incident occurred during the commute between the Walmart parking lot and Ironwood State Prison. This trip was the applicant's regular commute to work. Exhibit L confirms the van was traveling eastbound on the 10 Freeway, west of Hayfield Road, when the accident occurred at 8:48 p.m. or just before 9:00 p.m.

Applicant would pay $350 per month to Samuki Enterprises and he would then get reimbursed for the voluntary vanpool. (MOH/SOE Trial Day 1, 9/16/24, p. 12:10-12.)

Case law supports that an employee is barred from workers' compensation benefits when that employee is injured during the travel to work in an alternative commute program. However, once the applicant reaches the workplace and completes the commute, Labor Code section 3600.8 is no longer applicable, and the applicant may be entitled to benefits. In this case, the statute is applicable because applicant never reached the workplace due to the motor vehicle accident.

Labor Code § 3600.8(a) states that the employee must be paid his or her regular wage or salary in compensation for the periods of travel. The WCAB concluded that Labor Code § 3600.8(a) prohibits the finding of injury AOE/COE when an employee is utilizing an alternative commute program to travel to or from his or her place of employment, unless compensated for the travel. (*Rockwell International/Rocketdyne Div. v. Workers Comp. Appeals Bd*., 62 Cal. Comp. Cases 221 (Cal. App. 2d Dist. January 30, 1997, Writ Denied; see also *City of Redlands v. Workers Compensation Appeals Bd*., 1999 Cal. Wrk. Comp. LEXIS 5593 (Cal. App. 4th Dist. August 2, 1999) 64 Cal. Comp. Cases 1151, Writ Denied.)

In this case, the evidence supports that the applicant was not paid his regular wage or salary in compensation for the periods of travel. In fact, he was only reimbursed or paid $65 as part of the commuter program.

Applicant was injured on June 9, 2023, when he and other passengers were in a vanpool that originated in the Walmart parking lot in Indio to the destination of applicant's workplace located at Ironwood State Prison in Blythe, California.

The undisputed facts support applicant was voluntarily participating in an alternative commuter program. He was picked up by a private van owned by Walter Johnson in which he shared rides and costs with other commuters. Defendant did provide reimbursement of some of applicant's expense, but the defendant did not reimburse or pay his regular wage or salary to the applicant for the time spent commuting.

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DATE: November 18, 2024

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Eric Yee
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NO.: ADJ18137953

NORMAN MILLER **DEPT OF CORRECTIONS IRONWOOD,**

vs.

WORKERS' COMPENSATION JUDGE: **Hon. ERIC K. YEE**

DATE: **12/16/24**

DATE TRANSMITTED TO WCAB: **12/16/24**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Date of Injury:	June 9, 2023
Age on DOI:	47
Occupation:	Correctional Officer
Parts of Body Injured:	Abdomen, back, chest and legs
Identity of Petitioner:	Applicant
Timeliness:	The petition was filed on December 6, 2024
Verification:	The petition was verified
Date of Award and Order:	November 18, 2024
Petitioner's Contentions:	Petitioner contends the WCJ erred by finding: Not finding the claim compensable.
Date Transmitted to Appeals:	December 16, 2024

Petitioner, applicant, by and through its attorney of record, has filed a verified Petition for Reconsideration on December 6, 2024, challenging the Findings and Order dated November 18, 2024. Petition did not challenge the Finding that the claim was not presumed compensable.

Defendant filed an Answer on December 11, 2024, rejecting Defendant's arguments and asserting the petition should be denied based on the plain meaning of Labor Code section 3600.8.

In its Petition for Reconsideration, Petitioner argues that the Board acted without or in excess of its powers because the evidence does not justify the Findings of Fact, and the Findings of Fact do not support the Order or decision.

It is recommended that reconsideration be denied.

II

FACTS AND PROCEDURAL HISTORY

Applicant, Norman Miller, while employed on June 9, 2023, as a Correctional Officer, by the Department of Corrections, Ironwood, was a passenger in a private van that was traveling to his workplace when the van was involved in a motor vehicle accident. At the time of the accident, his transportation in the vanpool was for his regular shift. Applicant suffered injuries but had a significant recovery and has returned to work, performing his usual and customary duties.

The vanpool vehicle was driven by John Dennis Abejar and the registered owner was Walter Johnson of Beaumont, California. Applicant participated in a voluntary vanpool.

The main issue is whether the incident is compensable or barred by the going and coming rule or statute. Petitioner asserts that the case should be compensable based on exceptions to the going and coming rule. Defendant asserts that the claim is barred by statute.

III

DISCUSSION

The claim is barred by the statute of Labor Code section 3600.8. Nonetheless, Petitioner asserts various exceptions to the going and coming rule. The court will address each of the Petitioner's arguments stated in the Petition for reconsideration.

Petitioner asserts that the court should have created an exception to the going and coming rule and find applicant's case compensable. Petitioner's opening argument cites case law based on the standards of Labor Code section 3202; that is, the general principles that the Labor Code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of the applicant. The court did consider such guidelines when the court issued the decision, and, even when liberally construed, applicant's claim was not meritorious.

Petitioner acknowledges the general principle that an employee is barred by the going and coming rule that an employee does not pursue the course of his employment when he is on his way to or form work. The facts in this case support this fact that the applicant was going to work and the claim is barred under this general principle of law.

Petitioner argues the theory that an exception applies because the employer received a benefit from and controlled the vanpool because an employee will be alert and on time for work. However, these qualifications are essential and mandatory for any job and do not or should not trigger the exception to the going and coming rule.

Petitioner further asserts that those who participate in the vanpool could also be subject to disciplinary actions. Applicant, being a sworn officer, can be subject to

disciplinary actions beyond the vanpool, and this broad scope of an officer's conduct outside of employment should not allow an exception to the going and coming rule.

Petitioner's next assertion is the Required Vehicle Exception. However, in this case, applicant was not required to furnish, nor regularly utilize a private vehicle or the vanpool vehicle during work hours. The applicant was not required to utilize the vanpool vehicle between prisons. If any transportation between prisons was necessary, the employer would provide state vehicles. Therefore, there was no required transportation exception.

Petitioner asserts the payments totaling $2,600.00 per year allows exception to the going and coming rule. However, this benefit pertains to the contractual agreement according to the Memorandum of Understanding ("MOU"), applicable to certain prisons, including Ironwood. There is no mention in the MOU agreement that the payment was for mileage, nor that it was for transportation. Moreover, Subsection 5 of the MOU specifically stated it shall not be considered as compensation for purposes of retirement compensation. This payment was given to all employees who work at those specified prisons, regardless of where the employee resides.

Petitioner's Petition for Reconsideration never addressed the fundamental fact that the vehicle that the applicant was a passenger in during the accident was neither registered nor owned by the state. The vehicle was privately owned, and the applicant voluntarily participated in the program. He was not required to utilize the program, and the program was not a condition of his employment. The $65.00 per month payment the applicant received to participate in this voluntary vanpool as reimbursement for the vanpool was not wages, salary or compensation. Under these

facts, applicant's claim is barred by Labor Code section 3600.8, et seq., as expressly stated by the California Legislature.

IV

RECOMMENDATION

It is respectfully recommended that Applicant's Petition for Reconsideration be denied.

DATE: December 16, 2024

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Eric Yee
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE