WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

YU QIN ZHU, ***Applicant,*** **vs.** **DEPARTMENT OF SOCIAL SERVICES IHSS; administered by YORK RISK SERVICES GROUP, INC.,** ***Defendants.***	**Case No. ADJ10324875** **(Van Nuys District Office)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Defendant, the Department of Social Services, seeks reconsideration of the Findings of Fact of June 30, 2016, in which the workers' compensation judge (WCJ) found that on December 16, 2015, applicant was employed as a caregiver by IHSS,[1] and that applicant sustained injury arising out of and occurring in the course of employment on that date.

Defendant contends that "applicant was not an employee of IHSS within the meaning of Labor Code section 3351.5 at the time she sustained injuries, so her injuries did not arise out of and in the course and scope of her employment with IHSS."

There was no answer to the petition for reconsideration.

The WCJ submitted a Report and Recommendation.

Based on our review of the record and applicable law, we conclude that applicant's injury did not occur within the course of employment. Therefore, we will grant reconsideration, rescind the WCJ's decision, and substitute our finding that on December 16, 2015, applicant did not sustain injury arising out of and occurring in the course of employment.

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[1] IHSS is a social program, mandated by the state and administered by local government, that provides in-home care for disabled people.

BACKGROUND

The WCJ's Report describes the factual circumstances of applicant's injury of December 16, 2015:

> The applicant testified at trial on 6/23/16 that she worked for the State of California Department of Social Services as a caretaker on 12/16/15.
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> On the date of the injury in question, she provided care for one couple in their home in the morning from 8:30 am to 11:30 am. She was on her way to her other client, travelling by bicycle, when she was hit by a motor vehicle at noon. She sustained injuries and was hospitalized.
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> The Applicant testified that she was hired by the State of California after applying to work as a caretaker in 2003. She got paid by the State of California once every two weeks and got one paycheck for all the work she did. (MOH/SOE, p. 3) She received no money or salary from the clients for whom she worked. Her only pay was from the State of California.
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> She did not stop to have lunch between clients. She would eat her lunch at the house of the second patient before she started working. (MOH/SOE, p. 4) Applicant was not paid for her transportation time between the clients' houses.
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> Defendant denied the claim stating that she was not injured while performing service incidental to her employment and while acting within the scope of her employment. (Def's Exhibit A).
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> After the trial and a review of the evidence, it was found by the undersigned that Applicant's transportation between the clients' homes was a mandatory part of the employment and Applicant sustained injury arising out of and in the course of employment on 12/16/15.

In addition, we note that the WCJ's Report correctly describes the issue as "whether applicant sustained injury arising out of and in the course of employment while travelling by bicycle between two clients' homes where she worked as a caregiver."

DISCUSSION

Preliminarily, we observe that defendant's contentions regarding employment are puzzling. It appears that defendant contends it did not employ applicant and cannot have workers' compensation liability because defendant did not pay applicant's expenses for travel between clients. We disagree.

First, as relevant to the issue of whether there was an employment relationship between applicant and defendant, it does not matter that defendant did not reimburse applicant for travel expense because defendant paid applicant for the services she performed for the clients. Second, the fact that applicant was employed by the clients does not prevent a finding she was employed by defendant as well. There was a dual-employment relationship in which defendant can have workers' compensation liability as an employer, pursuant to Labor Code section 3351.5. (*In-Home Supportive Services v. Workers' Comp. Appeals Bd.* (*Bouvia*) (1984) 152 Cal.App.3d 720 [49 Cal. Comp. Cases 177].) In short, defendant's reliance upon section 3351.5 and *Bouvia* is misplaced because there is no question that applicant was an employee of defendant at the time of injury.

In contrast to the issue of employment, the issue of whether applicant's injury occurred in the course of employment is consequential in this case. (Lab. Code, § 3600, subd. (a).) In order for an injury to be compensable it must occur in the course of employment, which refers to the time and space limitations of employment. (1 *Cal. Workers' Comp. Practice* (Cont. Ed. Bar, July 2015 Update) Jurisdiction, § 2.42, p. 2-29.) When a case involves an injury sustained en route to or from work, as here, the going and coming rule is implicated. The rule provides that an injury suffered during a local commute en route to a fixed place of business at fixed hours, in the absence of special or extraordinary circumstances, is not within the course of employment. (See *Lantz v. Workers' Comp. Appeals Bd.* (2014) 226 Cal.App.4th 298, 309 [79 Cal.Comp.Cases 488], citing *Hinojosa v. Workers' Comp. Appeals Bd.* (1972) 8 Cal.3d. 150, 158–159 [37 Cal.Comp.Cases 734] ("*Hinojosa*").)

In this case, the applicability of the going and coming rule means that the injury suffered by applicant while traveling between clients is not compensable unless there is an exception to application of the rule. It appears that the WCJ has offered differing rationales for finding the existence of an exception. In her Opinion on Decision, the WCJ implied that applicant was paid for time traveling between clients. Therein the WCJ stated that "applicant's transportation between the clients' homes was a mandatory part of the employment. *Applicant was paid by IHSS for all her hours worked* and received only once check every two weeks." (Italics added.) In her Report, however, the WCJ clearly states that "applicant was not paid for her transportation time between the clients' houses." Yet the WCJ adds that

"there was an implied requirement that Ms. Zhu use her own transportation to go from one caretaker job to the next." Thus it appears that the WCJ ultimately relied upon the "required vehicle" exception to the going and coming rule, citing *Smith v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 814 [33 Cal.Comp.Cases 771] and *Hinojosa, supra.*

We disagree, because *Hinojosa* and *Smith* are distinguishable.

In *Hinojosa*, it was necessary for the workers to have transportation during the workday because the employer shifted them from one employer-owned ranch to another, and the workers did not know where or how long they would be working from one day to the next. Because the employer required the workers to provide their own transportation and the employer benefited from not having to provide transportation during the workday, the Supreme Court in *Hinojosa* upheld an award of benefits to a ranch hand who was injured while en route home, finding the injury excepted from the going and coming rule.

In *Smith*, the Supreme Court held that the going and coming rule did not bar coverage where the employee was killed in an accident while driving his car to the employer's premises, pursuant to the employer's requirement that the employee furnish his own car.

However, this case is different from *Hinojosa* and *Smith.* Here, applicant suffered injury while commuting between the homes of clients whom applicant had selected and with whom she had chosen her work hours. Unlike the ranch workers in *Hinojosa*, applicant chose her own clients and work locations and hours. In essence, applicant merely used defendant to obtain client referrals. Applicant also chose the means of transport to her clients. As with any employee who drives to work or takes some other form of transit in a "normal" commute, in this case it did not matter to defendant how applicant got to work. Applicant's travel to her clients' houses by bicycle was for her own convenience and benefit. This case also is different from *Smith* because defendant did not require applicant to have a car or bicycle. Again, there was an implied requirement that applicant get herself to work, but this is no different from the vast number of employers who implicitly require their employees to transport themselves to work by whatever means of conveyance they choose.

In summary, we are not persuaded that this case comes within any exception to the going and coming rule because defendant did not have control over applicant's commute, and the benefit to

defendant as a result of applicant's self-transport was indirect and minimal compared to the ease and convenience realized by applicant. (See *Lantz, supra,* 226 Cal.App.4th 298 at 310 ["Cases that result in coverage usually can be explained on the grounds that it is unfair for the employee to have no coverage where the employer exercised control over the employee's commute, the employer reaped some benefit not typically associated with ordinary employee travel, or both."])

We will grant reconsideration, rescind the WCJ's decision, and substitute our finding that on December 16, 2015, applicant did not sustain injury arising out of and occurring in the course of employment.

For the foregoing reasons,

IT IS ORDERED, that reconsideration of the Findings of Fact of June 30, 2016 is **GRANTED**, and that as the Decision After Reconsideration of the Workers' Compensation Appeals Board, said Findings are **RESCINDED**, and the following Findings are **SUBSTITUTED** in their place:

FINDINGS

1. Yu Qin Zhu, Applicant, was employed on December 16, 2015 as a caregiver, Occupational Group No. 340, at El Monte, California, by IHSS.

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2. Applicant did not sustain injury arising out of and in the course of employment on December 16, 2015.

WORKERS' COMPENSATION APPEALS BOARD

FRANK M. BRASS

I CONCUR,

KATHERINE ZALEWSKI

I DISSENT. (See Attached Dissenting Opinion)

JOSÉ H. RAZO

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 19 2016

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

LEWIS BRISBOIS BISGAARD & SMITH
MICHAEL SABZEVAR
YU QIN ZHU

JTL/bea

DISSENTING OPINION OF COMMISSIONER RAZO

I dissent. For the reasons stated below, and for the reasons stated in the WCJ's Report and Recommendation, which I adopt and incorporate, I would deny defendant's petition for reconsideration and I would affirm the WCJ's finding that applicant sustained injury arising out of and occurring in the course of employment.

At the outset, I would point out that defendant's petition, with its opaque contentions about employment, can be considered to have waived the going and coming rule, because there is no mention of the rule in the petition for reconsideration. (Lab. Code, § 5904.) Thus, "[i]nstead of a fair and sincere effort to show that the [WCJ] was wrong, appellant's brief...is an attempt to place upon [this Board] the burden of discovering without assistance from appellant any weakness [...]. An appellant is not permitted to evade or shift his responsibility in this manner." (*Neilsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 923 [50 Cal.Comp.Cases 104].)

Turning to the going and coming rule, I see little practical difference between this case and *California Compensation Ins. Co. v. Workers' Compensation Appeals Bd.* (*McCarty*) (1992) 57 Cal.Comp.Cases 374 (writ den.). In *McCarty*, the Board concluded that by "custom and usage" the applicant's employer had come to rely upon his use of his personal vehicle during the workday, and that the availability of the vehicle had become an expectation from past practices. In *McCarty*, the Board also explained that "the exception to the going and coming rule does not apply only when the employer requires the employee's use of a personal vehicle. The exception may apply when the employer approves and encourages use of the personal vehicle, such that that use can be characterized as an expectation of the employer in which the employee acquiesced."

In this case, I agree with the WCJ that there was an implied requirement that applicant furnish her own transportation to travel between disabled clients, care for whom *is the responsibility of defendant.* In addition, I am persuaded that applicant qualifies for the "required vehicle exception" to the going and coming rule. In *Rhodes v. Workers' Comp. Appeals Bd.* (1978) 84 Cal.App.3d 471, 475 [43 Cal.Comp.Cases 1001], the Court of Appeal explained this exception as follows:

> "An exception to the going and coming rule is where the employer requires that the employee bring a car to and from work for use in his employment duties. [*Hinojosa v. Workers' Comp. Appeals Bd.* (1972) 8 Cal.3d. 150, 160-161 [37 Cal.Comp.Cases 734]; *Smith v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 814 [33 Cal.Comp.Cases 771].)] In such a case the obligations of the job reach out beyond the employer's premises, make the vehicle a mandatory part of the employment, and compel the employee to submit to the hazards associated with private motor travel, which otherwise the employee would have the option of avoiding. Since this is the theory, it is immaterial whether the employee is compensated for the expenses of the trip. (*Hinojosa v. Workmen's Comp. Appeals Bd., supra,* 8 Cal.3d at p. 160.)"

The key to determining whether the required vehicle exception applies is to consider whether the employer received a benefit from the employee's provision of her own transportation between job sites. In *County of Tulare v. Workers' Comp. Appeals Bd.* (1985) 170 Cal.App.3d 1247, 1253-1254 [50 Cal.Comp.Cases 435], the Court of Appeal stated:

> "Once an employee has impliedly agreed to accommodate the employer and use his own vehicle, the employer can reasonably come to rely upon its use and expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment. Added to this formulation is the reimbursement of the employee for mileage on the job and the fact the use of the employee's vehicle is to the economic advantage of the employer. Under such a state of facts, which is what we have in the instant case, the employee is performing services growing out of and incidental to his employment (Lab. Code, § 3600) when he brings his car to work and makes it available for use on a regular basis. Accordingly, injuries suffered in the car while in transit to and from work are compensable."

In this case, the "required vehicle exception" applies because it was an implied condition of employment that applicant was required to furnish and use her own transportation to travel between clients, whether by car or bike or some other means of conveyance. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 894-896.)

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In sum, I am persuaded that applicant's injury occurred within the course of employment on account of the exceptions to the going and coming rule discussed above. In reference to the dual employment issue, defendant (the state) undoubtedly is in a better position to insure this injury for workers' compensation than any of applicant's clients. I would deny reconsideration and affirm the WCJ's finding that applicant's injury is compensable.

WORKERS' COMPENSATION APPEALS BOARD

JOSE H. RAZO, *Commissioner*

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 1 9 2016

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

LEWIS BRISBOIS BISGAARD & SMITH
MICHAEL SABZEVAR
YU QIN ZHU

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