WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FERNANDO MARTINEZ, ***Applicant,*** **vs.** **D.H. SMITH COMPANY, INC.; ICW GROUP,** ***Defendant,***	**Case No. ADJ271398 (SFO 0505138)** **OPINION AND ORDERS DENYING DEFENDANT'S PETITION FOR RECONSIDERATION, GRANTING APPLICANT'S PETITION FOR RECONSIDERATION, AND DECISION AFTER RECONSIDERATION**

Applicant and defendant each seek reconsideration of the March 26, 2009 Findings and Order of the workers' compensation administrative law judge, who ordered that applicant take nothing by way of his claim of industrial injury incurred as a result of a vehicle collision based upon the following finding:

> "Applicant's injury was taken out of the scope of employment, in that the cause of applicant's injury was that applicant increased the risk of injury to applicant and his son and the public and to property and liability of defendant, in violating a specific employer direction not to drive the company truck because he had no driver's license, and was not authorized by the company to drive a company vehicle, and that his sons should be the only ones to drive the truck."

The WCJ further found that the injury claim was not barred by the "going and coming rule" because, "driving the vehicle without a drivers license contrary to the admonition of the employer did not constitute a material deviation from the route of the authorized transport of the truck and passengers to the job site."

Applicant contends that the WCJ should have found that his injuries arose out of and occurred in the course of his employment.

Defendant contends that the WCJ should have determined that applicant's claim is barred by the "going and coming" rule.

We grant applicant's petition for reconsideration, rescind the March 26, 2009 Findings and Order and enter a new finding that applicant's injuries arose out of and occurred in the course of his employment. It does not matter if the injury occurred outside the "scope" of applicant's employment as found by the WCJ because applicant was authorized to travel to work in the employer's truck, and even if the injury occurred while the authorized travel was conducted in an unauthorized manner it arose out of and occurred in the course of employment.

We deny defendant's petition because the WCJ properly determined that the going and coming rule does not apply to bar applicant's claim.

Applicant and his two sons worked for defendant. Although applicant did not have a driver's license, the employer authorized him to travel to and from work sites as a passenger in its Ford F350 flatbed truck while one of his sons drove. On June 26, 2007, applicant and his son were travelling in defendant's truck to a job site. Applicant was driving the truck when he rear-ended another vehicle on the freeway, injuring himself and his son. At first, applicant and his son lied to the investigating officer from the California Highway Patrol about who was driving the company truck. However, marks on their bodies from their seatbelts showed that applicant was driving and his son was a passenger at the time of the collision, and they ultimately admitted that fact.

At trial, defendant presented evidence that applicant was told not to drive the truck because he was unlicensed, but that his sons were authorized to drive the vehicle. Applicant disputed defendant's evidence and testified that the employer knew he drove the truck, implicitly authorizing him to do that. Following the trial the WCJ entered his decision denying applicant compensation on the ground that his injury was incurred outside the "scope" of employment because he was driving the truck without a driver's license contrary to the direction of the employer. The WCJ further explained his reasoning in his Report and Recommendation on Petition for Reconsideration (Report), as follows:

> "After consideration of all of the evidence, testimony at trial and in deposition, and the demeanor of witnesses, it was found that applicant's conduct in driving the company truck to work without a driver's license, against the express orders of the employer, was a

> cause of the injury, and takes the activity in which the injury occurred outside the course of employment. The conduct of driving the company truck on public highways against the express order of the company was more than the manner of performing duties. It was different duties than he was employed for. It appears that applicant did drive the truck before his sons were licensed, contrary to the testimony of defendants. However, on the evidence it is clear that he was not allowed to drive after they were licensed, and he and his sons were well aware of that...
>
> "Applicant's conduct in this case posed an increased hazard to his own safety and life, to that of his son and members of the public, and greatly increased the risk of liability to the employer for property and injury. It is not just a manner of performing an authorized job duty. His only duty was to ride to work in the truck with his son driving. His act of driving illegally against the express order of the employer was an act outside the course of employment. It does not compare to swimming in a canal against the rules, or speeding on a public road, or riding on a train engine."

Turning to applicant's contentions, we agree that the preponderance of the evidence supports a finding that he incurred injury arising out of and in the course of his employment as a result of the June 26, 2007 vehicle collision. Although the WCJ in his Report describes applicant's driving of the truck as an action that took his injury outside of the "course" of his employment, and not just an action outside the "scope" of employment as stated in the March 26, 2009 findings, the WCJ's change in words does not change the fact that applicant was injured while engaged in an authorized activity, travelling to a job site in the employer's truck. In this case, it does not matter that applicant may not have been authorized by defendant to drive the truck because his travel to the job site in the truck was authorized by the employer and was of benefit to the employer.

Workers' compensation benefits are to be awarded when an employee has sustained a compensable injury. (*Industrial Indem. Co. v. Industrial Acc. Com.* (*Keller*) (1951) 103 Cal.App.2d 259 [16 Cal.Comp.Cases 171.) To be compensable, an injury must meet the conditions of compensation set out in Labor Code section 3600.[1] Among those conditions is the requirement that, "at the time of the injury, the employee is performing service *growing out of and incidental to his or her employment and is acting within the course of his or her employment.*"

[1] Further statutory references are to the Labor Code.

(Lab. Code, § 3600(a)(2), emphasis added.)

The words "growing out of" in section 3600 convey the idea of a causal relationship between the employment and the injury, which is often described as "arising out of." The words "within the course of his or her employment" as used in section 3600 "signify that the injury occurred within the time and space limitations of the employment." (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.App.4th 644 [63 Cal.Comp.Cases 253], quoting *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729 [48 Cal.Comp.Cases 326]); see also *Employers Mut. Liab. Ins. Co. v. Industrial Acc. Com.* (*Gideon*) (1953) 41 Cal.2d 676 [18 Cal.Comp.Cases 286]; *Kimbol v. Industrial Acc. Com.* (*Douglas*) (1916) 173 Cal. 351 [3 I.A.C. 421].) A worker acts in the course of employment if engaged in an activity that is reasonably incidental to the employment. (*Lockheed Aircraft Corp. v. Industrial Acc. Com.* (*Janda*) (1946) 28 Cal.2d 756 [11 Cal.Comp.Cases 209]; *Magniani v. Workers' Comp. Appeals Bd.* (1999) [64 Cal.Comp.Cases 464 (writ den.).)

In this case the WCJ denied compensation, in part, because he found that applicant's injury was not incurred in the "scope" of his employment. However, the question of whether an employee was acting in the *scope* of employment at the time he or she was injured is not relevant to whether the injury is compensable under the workers' compensation statutes. Section 3600 contains *no* reference to "scope of employment." Instead, the issue of "scope of employment" relates to the tort question of whether an employer is liable for an employee's action under the doctrine of *respondeat superior*. The tort law requirement that an employee's action must be within the "scope of employment" before liability attaches to the employer is much narrower than the section 3600 provision that authorizes benefits for injuries "growing out of" and "within the course of his or her employment." (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053.)

As the Supreme Court wrote in *Saala v. McFarland* (1965) 63 Cal.2d 124, 129 fn.3 [30 Cal.Comp.Cases 220]:

"It is true that on occasion the phrase 'scope of employment' has

> been used interchangeably with 'arising out of and in the course of the employment.' However, this court recognized in a leading case involving work[er's] compensation coverage...that scope of employment defines a more restricted area of employee conduct than the customary phrase 'arising out of and in the course of the employment.' We stated: 'Although this court has not gone so far as to hold that every injury to an employee attending to his duties and within the course of the employment is compensable, it has, in many cases, upheld the allowance of compensation for injuries arising out of acts *not strictly within the scope of the employment*: returning from lunch; drinking wine because of indisposition; smoking..." (Emphasis in original, citations omitted.)

Here, both applicant and his son were authorized to travel in defendant's vehicle to and from job sites. This conferred a benefit not only upon the employees, but also upon the employer, who obtained the advantage of having the truck secured by the employees during the evenings and available at the work site during the daytime. The fact that applicant was travelling in the vehicle as its driver instead of as a passenger at the time of the collision does not change the facts that his travel in the truck was authorized and for the employer's benefit.

> "A distinction must be made between an unauthorized departure from the course of employment and the performance of a duty in an unauthorized manner. Injury occurring during the course of the former conduct is not compensable. The latter conduct ... does not take the employee outside the course of his employment." (*Pacific Tel. & Tel. Co. v. Workers' Comp. Appeals Bd.* (1980) (*Blackburn*) 112 Cal.App.3d 241 [45 Cal.Comp.Cases 1127]; c.f. *Auto Lite etc. Corp. v. Industrial Acc. Com.* (1947) (*Pennella*) 77 Cal.App.2d 629 [12 Cal.Comp.Cases 10].)

Regardless of whether the transportation of the vehicle was done in an authorized or unauthorized fashion, the benefit to the employer was the same; the truck and employees were being transported to the job site. "[A]ll reasonable doubts as to whether an injury arose out of employment are to be resolved in the employee's favor." (*Ross v. Workmen's Comp. Appeals Bd.* (1971) 21 Cal.App.3d 949 [36 Cal.Comp.Cases 776], citing, Evid. Code, § 520 and *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) For these reasons, we enter a new finding that applicant's injury in the vehicle collision arose out of his employment and in the course of his employment.

Turning to defendant's contention, we note that injuries incurred while traveling to or from a work site are ordinarily not compensable when the employer does not provide the transportation, is not paying for the employee's services, and obtains no benefit from the employee's travel. (*Mission Ins. Co. v. Workers' Comp. Appeals Bd.* (*Fitzgerald*) (1978) 84 Cal.App.3d 50 [43 Cal.Comp.Cases 889]; *City of San Diego v. Workers' Comp. Appeals Bd.* (*Molnar*) (2001) 890 Cal.App.4th 1385 [66 Cal.Comp.Cases 692].) However, this "going and coming rule" is subject to several exceptions. Of importance in this case is the long recognized exception that arises when the employer provides the means of transportation. (*California Casualty Indemnity Exchange v. Industrial Acc. Com.* (*Duffus*) (1942) 21 Cal.2d 461 [7 Cal.Comp.Cases 305]; *XKT Engineering, Inc. v. Workers' Comp. Appeals Bd.* (*Holtzhauser*) 66 Cal.Comp.Cases 314 (writ den,.).) When the employer provides the means of transportation the course of employment begins when the employee begins to travel. (See *Zenith Nat. Ins. Co. v. Workers' Comp. Appeals Bd.* (*DeCarmo*) (1967) 66 Cal.2d 944 [32 Cal.Comp.Cases 236]; *Kobe v. Industrial Acc. Com.* (*Ruble*) (1950) 35 Cal.2d 33; 15 Cal.Comp.Cases 85]; *Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150 [37 Cal.Comp.Cases 734]; *Duffel v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 262 (writ den.).)

There is no dispute in this case that the employer provided the truck that applicant and his son used to travel to the job site. Indeed, defendant acknowledges that the "going and coming rule" would not bar compensation if applicant had been a passenger in the truck because he admittedly would have been injured in the course of traveling to the job site. However, defendant argues that because at the time of the collision applicant was driving the truck without a license contrary to the employer's direction, there was such a material deviation from the purpose of applicant's employment that workers' compensation benefits should be barred for the resulting injury. (See *Red Arrow Bonded Messenger Corp. v. Industrial Acc. Com.* (*O'Brien*) (1940) 39 Cal.App.2d 559 [5 Cal.Comp.Cases 139].) We disagree.

A worker acts in the course of employment while off the employer's premises if engaged in an activity that is expressly or impliedly authorized by the employer. (*Lockheed Aircraft Corp. v.*

Industrial Acc. Com. (*Janda*) (1946) 28 Cal.2d 756 [11 Cal.Comp.Cases 209].) As discussed above, there is no dispute that applicant was expressly authorized by the employer to travel to the job site in the truck. There also is no dispute that at the time of the collision the truck was being used to transport the workers to the job site as intended, and there is no evidence that the vehicle was being used for anything other than work related travel at the time of the collision. The fact applicant was not licensed to drive does not change the fact he was acting in the course of his employment. (*Litzmann v. Workers' Comp. Appeals Bd.* (1968) 266 Cal.App.2d 203 [33 Cal.Comp.Cases 584], quoting and citing *State Compensation Ins. Fund v. Industrial Acc. Com.* (*Hull*) (1952) 38 Cal. 2d 659 [17 Cal.Comp.Cases 68] ["misconduct on [an applicant's] part is not a defense"]; *Western Pac. R.R. Co. v. Industrial Acc. Com.* (*Johnson*) (1924) 193 Cal. 413 [11 Industrial Acc. Com. 218] [riding an unlighted bicycle in violation of the Vehicle Code not a bar to workers' compensation benefits]; *Williams v. Workmen's Comp. Appeals Bd.* (1974) 41 Cal.App.3d 937 [39 Cal.Comp.Cases 619] [benefits not barred for injury incurred following a high-speed chase through heavy traffic after employee had run a red light]; *Westbrooks v. Workers' Comp. Appeals Bd.* (1988) 53 Cal.Comp.Cases 157 (writ den.) [bus driver who sustained injury as a result of nearly hitting an oncoming vehicle while recklessly driving his bus not barred from recovering workers' compensation benefits for the injury].) Under the circumstances of this case, the "going and coming rule" does not bar applicant from recovering workers' compensation benefits for his injury in the collision because the injury was incurred in the course of his employment.

The March 26, 2009 Findings and Order of the WCJ are rescinded, a new finding of injury arising out of and in the course of employment is made, and the case is returned to the trial level for further proceedings on applicant's claim for workers' compensation benefits.

///

///

///

///

For the foregoing reasons,

IT IS ORDERED that defendant's petition for reconsideration of the March 26, 2009 Findings and Order of the workers' compensation administrative law judge is **DENIED.**

IT IS FURTHER ORDERED that applicant's petition for reconsideration of the March 26, 2009 Findings and Order of the workers' compensation administrative law judge is **GRANTED.**

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Appeals Board that the March 26, 2009 Findings and Order of the workers' compensation administrative law judge is **RESCINDED** and the following Finding of Fact is **SUBSTITUTED** in their places:

FINDING OF FACT

1. Applicant, Fernando Martinez, while employed by D.H. Smith Company on June 26, 2007 sustained injury arising out of and occurring in the course of his employment as a result of a motor vehicle collision.

///

///

///

///

///

///

///

///

///

///

///

///

///

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Appeals Board that the case is **RETURNED** to the trial level for further proceedings on applicant's claim for workers' compensation benefits.

WORKERS' COMPENSATION APPEALS BOARD

JAMES C. CUNEO

I CONCUR,

DEPUTY

RICK DIETRICH

ALFONSO J. MORESI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 09 2009

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

Fernando Martinez
David Lowe
D'Andre, Peterson, et. al.

JFS/aml