Richard Warner, Petitioner v. Workers' Compensation Appeals Board, County of Los Angeles, Respondents

Civil No. B232190—Court of Appeal, Second Appellate District, Division Five

77 Cal. Comp. Cases 9, 2011 Cal. App. Unpub. LEXIS 9886

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Prior History: W.C.A.B. No. ADJ7264969—WCJ Robin A. Brown (VNO); WCAB Panel: Deputy Commissioners Dietrich, Sullivan, Commissioner Moresi [*see* Warner v. County of Los Angeles, 2011 Cal. Wrk. Comp. P.D. LEXIS 144 (Appeals Board panel decision)]

Disposition: Proceeding to review a decision of the Workers' Compensation Appeals Board. Decision *annulled* and matter *remanded*.

Counsel: For petitioner—Straussner Sherman, by Aaron Straussner
For respondent County of Los Angeles—Brenner & Sterner, by Cornelia Sterner, Paul M. Ryan

Injury AOE/COE—Dual Purpose Doctrine—Court of Appeal, in split decision annulling WCAB decision and remanding case, held that, pursuant

to dual purpose doctrine, applicant's injury occurred in course of employment, arose out of employment, and was proximately caused by employment, when Court of Appeal found that applicant, firefighter on Catalina Island, was required to live on island, was required to be available 24 hours per day in order to respond to emergencies, responded to calls from his home 26 weekends per year, and was required to work at home every other weekend because there was no place for him to stay at fire station, that Catalina Island residents know that applicant is firefighter and sometimes go to his house to request assistance when they see fire truck parked on street, that, when residents go to his house for assistance, they have to walk through wisteria-laden path, that on date of injury, a Sunday, applicant was on duty at home and responded to wife's request to help her trim wisteria, that applicant was injured in fall from ladder while trimming wisteria, that applicant's trimming of wisteria was both personal chore and performance of service for defendant employer, and that injury was thus compensable as result of performance of task fulfilling dual purpose. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[1], [2], 4.03-4.04, 4.138[2].]

Opinion By: Turner, P.J. (Mosk, J., dissenting)

Petitioner, Richard Warner, is a firefighter employed by the County of Los Angeles (the county). On April 1, 2010, petitioner filed a workers' compensation claim for injuries he sustained when he fell off a ladder trimming wisteria branches while on duty at his residence. Petitioner seeks annulment of the decision of the Workers' Compensation Appeals Board (the board) that his left wrist injury did not arise out of the course of his employment. On October 28, 2011, we granted petitioner's writ review petition. We conclude petitioner's act of trimming the wisteria was incidental to his employment even though it was done at his wife's request. Accordingly, the board's decision is annulled and the matter is remanded for further proceedings.

The facts are undisputed. The county maintains Fire Station 55 on Catalina Island that is staffed by a captain and a firefighter specialist. In 1993, the county recognized the need to increase fire staffing on the island. The increased compensation is designed to compensate the firefighter for: higher housing costs, including taxes; moving and transportation expenses; and other living expenses. Since 1993, petitioner has served as a firefighter specialist at Fire Station 55. The work schedule is unique. Both the captain and petitioner are required to live on Catalina Island to respond to emergency incidents 24 hours per day. The captain and his family live at Fire Station 55. The captain, sometimes with help from petitioner or a relief captain, cleans and maintains the lawn, gardens, bushes and trees at the fire station. Petitioner and Captains Richard Harp, Michael Lewis, David Gillotte and Mitchell Charles Brown, testified their firefighting duties include maintenance of the fire station's grounds. The maintenance tasks include mowing the lawn, clearing brush, trimming bushes, and removing trees. Because petitioner is not provided housing, he receives a stipend equivalent to an 11 percent increase in

salary to offset the high cost of living on the island. The rate of pay is "four schedules higher" than that for a typical firefighter's compensation.

Petitioner works scheduled times at the fire station during weekdays. But petitioner is not at the fire station on weekends or when he is on call. Unless relieved in advanced by the captain, petitioner is required to be available 24 hours per day in order to respond to emergency incidents. Petitioner responds to calls from his home 26 weekends per year. Petitioner is on call from his home after work hours because there is no place for him to stay at the fire station. He responds to calls from his home more than from the fire station. In the event of a major incident, petitioner is required to respond from his home. Ninety percent of the calls for assistance come from locations closer to petitioner's home than to the fire station which is at the end of a road through town. Catalina Island residents know petitioner is a firefighter and sometimes go to petitioner's house to request assistance when they see the fire truck parked on the street outside his home. When the residents go to petitioner's house for assistance, they have to walk through a wisteria-laden path. Island residents will go to petitioner's house for assistance if they live nearby or if an injury occurs near his home. The county has no ownership interest or control over petitioner's residence or input regarding its particular location. The county neither inspects petitioner's residence and equipment at his home nor provides maintenance guidelines.

On Sunday, February 14, 2010, petitioner was on duty at home. Petitioner did some inventory work of search and rescue team pagers in his home office before leaving to check on the equipment in the fire truck. As petitioner was going down the front stairs of his house, his wife asked him to help her trim the wisteria. The wisteria grows in front of his house and in the pathways. Because wisteria grows everywhere, it will hit everyone in the face if it is not trimmed. To assist his wife, petitioner climbed up a ladder to trim the wisteria. Part of the trellis gave way, and petitioner fell off the ladder and injured himself. Petitioner sustained injury to his neck, back, and left elbow, wrist and shoulder.

On September 21, 2010, the workers' compensation judge heard the trial testimony of Captains Harp, Lewis, Gillotte and Brown and petitioner. On November 30, 2010, the workers' compensation judge found petitioner "did not sustain injury arising out of or occurring in the course of employment" and ordered he receive nothing. The workers' compensation judge found petitioner and captains provided credible testimony at trial. But, the workers' compensation judge ruled petitioner's fall and injury while trimming the wisteria was far removed from the reasonable contemplation of the employment. On December 28, 2010, the workers' compensation judge recommended denial of petitioner's reconsideration petition.

On February 22, 2011, the board denied petitioner's reconsideration petition. The board held the "bunkhouse rule" was inapplicable because petitioner was not required to live on the employer's premises even though he was required to live on Catalina Island. The board found the county had no: ownership interest in petitioner's home; input on its location; control over its premises, and requirement

that it be maintained and inspected. The board also found it was clear that petitioner was required to work at home by the county. Nonetheless, the board found petitioner did a personal chore in aid of his wife and was not performing a service for the county when he trimmed the wisteria. The board ruled, "Trimming the wisteria cannot be considered 'performing service' for the employer with[in] the meaning of [Labor Code] section 3600 [subdivision] (a)(2)[1] or to be 'proximately caused' by applicant's employment within the meaning of section 3600 [subdivision] (a)(3)."

We defer to the board's findings of fact if supported by substantial evidence. (*Dept. of Rehabilitation v. Workers' Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1290 [135 Cal. Rptr. 2d 665, 70 P.3d 1076, 68 Cal. Comp. Cases 831]; *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164 [193 Cal. Rptr. 157, 666 P.2d 14, 48 Cal. Comp. Cases 566].) But where the facts are undisputed we apply the following standard of review, " '[T]he question of whether an injury was suffered in the course of employment is one of law, and a purported finding of fact on that question is not binding on an appellate court.' " (*Santa Rosa Junior College v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 345, 351 [220 Cal. Rptr. 94, 708 P.2d 673], quoting *Reinert v. Industrial Acc. Com.* (1956) 46 Cal.2d 349, 358 [294 P.2d 713, 21 Cal. Comp. Cases 78]; see *Dimmig v. Workmens' Comp. Appeals Board* (1972) 6 Cal.3d 860, 864 [101 Cal. Rptr. 105, 495 P.2d 433, 37 Cal. Comp. Cases 211].) The board's conclusions of law are subject to de novo review. (*Dept. of Rehabilitation v. Workers' Comp. Appeals Bd., supra,* 30 Cal.4th at p. 1290; *Barnes v. Workers' Comp. Appeals Bd.* (2000) 23 Cal.4th 679, 685 [97 Cal. Rptr. 2d 638, 2 P.3d 1180, 65 Cal. Comp. Cases 780].)

Under section 3202, issues of compensation are to be liberally construed for purposes of extending benefits for the protection of injured persons. (*Dept. of Rehabilitation v. Workers' Comp. Appeals Bd., supra,* 30 Cal.4th at p. 1290.) Our Supreme Court has stated: "" '[A]lthough the employee bears the burden of proving that his injury was sustained in the course of his employment, the established legislative policy is that the Workmen's Compensation Act must be liberally construed in the employee's favor . . . , and all reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee. [Citation.] *This rule is binding upon the board and this court.*" ' " (*Id.* at p. 1290; *Martinez v. Worker's Comp. Appeals Bd.* (1976) 15 Cal.3d 982, 987 [127 Cal. Rptr. 150, 544 P.2d 1350, 41 Cal. Comp. Cases 51]; *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal. Comp. Cases 310].) Our Supreme Court has stressed that " 'All aspects of workers' compensation law . . . are to be liberally construed in favor of the injured worker.' " (*Dept. of Rehabilitation v. Workers' Comp. Appeals Bd., supra,* 30 Cal.4th at pp. 1290-1291, quoting *Save Mart Stores v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.App.4th 720, 723 [4 Cal. Rptr. 2d 597, 57 Cal. Comp. Cases 89].)

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

Section 3600, subdivision (a) states in pertinent part: "Liability for the compensation provided by this division . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment . . . where the following conditions of compensation concur: [¶] (1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division. [¶] (2) Where, 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. [¶] (3) Where the injury is proximately caused by the employment, either with or without negligence. . . ." Section 3600, subdivision (a) requires both: that the injury occur " 'in the course of employment,' " which " 'ordinarily refers to the time, place, and circumstances under which the injury occurs' "; and that the injury " 'arise out of' " the employment, which must " 'occur by reason of a condition or incident of [the] employment.' " (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 733 [190 Cal. Rptr. 904, 661 P.2d 1058, 48 Cal. Comp. Cases 326].) Our Supreme Court explained: " ' "[A]n employee is in the 'course of his employment' when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do." ' " (*Maher v. Workers' Comp. Appeals Bd., supra,* 33 Cal.3d at p. 733, quoting *State Comp. Ins. Fund v. Industrial Acc. Com.* (1924) 194 Cal. 28, 33 [227 P. 168].) Our Supreme Court has stated: " '[S]uch connection need not be the sole cause; it is sufficient if it is a contributory cause. [Citation.]' " (*Maher v. Workers' Comp. Appeals Bd., supra,* 33 Cal.3d at p. 734, quoting *Employment Mutual Life Ins. Co. v. Industrial Acc. Com.* (1953) 41 Cal.2d 676, 680 [263 P.2d 4, 18 Cal. Comp. Cases 286].)

The board found petitioner was in the course of employment when he was injured because his residence was a secondary jobsite. However, the board concluded his injury did not arise out of his employment under section 3600, subdivision (a)(2). Also, the board found the injury was not proximately caused by his employment under section 3600, subdivision (a)(3). The board reasoned petitioner was trimming the wisteria at his wife's request; thus it was a purely personal act and not a service performed on behalf of the county, his employer. We respectfully disagree.

It is undisputed petitioner was on duty at his residence when he injured himself. Petitioner is required to work at home every other weekend because there is no place for him to stay at the fire station. Before he was injured, petitioner had just finished some paperwork in his home office and was on his way to inspect the equipment on the fire truck. On his way to the fire truck, petitioner's wife asked him to help her trim the wisteria. The wisteria grows in front of his house and in the pathways; it will hit everyone in the face if it is not trimmed. It is uncontested that Catalina Island residents sometimes go to petitioner's home for help when they believe he is at home because they know he is a firefighter. When residents go to petitioner's house for assistance, they have to walk through a wisteria-laden path. In addition, petitioner receives dispatch calls from his home, which is closer to the town, and is required to respond to emergency calls from his residence on

the weekends and after work hours. Although the wisteria has not prevented him from reaching the fire truck, it grows wild everywhere and looks better trimmed because it is visible from the street. It also is undisputed that the county requires its firefighters to maintain the fire station grounds, including trimming bushes, as part of their employment duties.

Here, trimming the wisteria ensures residents have safe access to petitioner's house and allows him to reach his fire truck in a safe and timely manner when responding to emergency calls. No doubt, petitioner trimmed the wisteria at his wife's request. But this does not negate that the activity was impliedly authorized by the county because it is undisputed that island residents sometimes go to petitioner's home for help. By trimming the wisteria, petitioner was engaging in an activity that benefited both himself and his employer. Referred to as the dual purpose doctrine, the Court of Appeal has explained: " '[W]here the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly [nor] indirectly could he have been serving his employer.' [Citation.]" (*Bramall v. Workers' Comp. Appeals Bd.* (1978) 78 Cal.App.3d 151, 157 [144 Cal. Rptr. 105, 43 Cal. Comp. Cases 288], quoting *Lockheed Aircraft Corp. v. Industrial Acc. Com.* (1946) 28 Cal.2d 756, 758-759 [172 P.2d 1, 11 Cal. Comp. Cases 209]; *Dimmig v. Workmen's Comp. Appeals Bd., supra,* 6 Cal.3d at p. 865 [" ' " 'the injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorized him to do' " ' "].)

In addition, under section 3202, both we and the board are required to resolve all reasonable doubts concerning whether an injury arose out of and occurred in the course of employment in favor of petitioner. Our Supreme Court has stated, " ' "*[A]ny reasonable doubt as to whether the act is contemplated by the employment, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee.*" ' " (*Dimmig v. Workmen's Comp. Appeals Bd., supra,* 6 Cal.3d at p. 865; *Dept. of Rehabilitation v. Workers' Comp. Appeals Bd., supra,* 30 Cal.4th at p. 1290 [" 'all reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee' "].) Accordingly, we conclude the board erred in holding petitioner's injury did not arise out of his employment and was not proximately caused by it. Because we conclude petitioner's injury is compensable under the dual purpose doctrine, we need not discuss petitioner's contentions concerning the applicability of the bunkhouse and personal convenience rules.

The decision of the Workers' Compensation Appeals Board is annulled and the case is remanded to the board for proceedings consistent with the views expressed herein. Petitioner, Richard Warner, shall recover his costs incurred in connection with these writ proceedings.

Turner, P.J.

I concur:

Armstrong, J.

Mosk, J., dissenting.

I respectfully dissent.

Petitioner relies upon several theories: "the bunkhouse rule"—i.e. " 'Where the employment contract contemplates, or the work necessity requires that the employee live or board on the employer's premises, the employee is considered to be performing services incidental to such employment during the time he is on such premises' " (*Aubin v. Kaiser Steel Corp.* (1060) 185 Cal.App.2d 658, 661 [8 Cal. Rptr. 497, 25 Cal. Comp. Cases 217]; see *Vaught v. State of California* (2007) 157 Cal.App.4th 1538, 1545 [69 Cal. Rptr. 3d 605, 73 Cal. Comp. Cases 125]); his residence was a "secondary job site; he was acting within the course of employment at the time of the injury; and the "personal convenience" rule or "personal comfort" doctrine (*Mason v. Lake Dolores Group* (2004) 117 Cal.App.4th 822, 838 [11 Cal. Rptr. 3d 914] (*Mason*))—i.e. "[a]cts of 'personal convenience' are within the course of employment if they are 'reasonably contemplated by the employment.' " (*Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 568 [209 Cal. Rptr. 674, 693 P.2d 254, 49 Cal. Comp. Cases 772]; see *Mason, supra,* 117 Cal.App.4th at p. 838 [" 'the course of employment is not considered broken by certain acts necessary to the life, comfort, and convenience of the employee while at work' "].)

None of these theories applies here. The petitioner is not residing on any premises provided to him by respondent. As a condition of his employment, petitioner was to provide for his own residence. Respondent did not require petitioner to maintain the premises as if it were a fire station.

Petitioner did perform some work at home (see *Wilson v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 181, 185 [127 Cal. Rptr. 313, 545 P.2d 225, 41 Cal. Comp. Cases 76]), but that is not conclusive. The second jobsite rule basically is utilized for the going and coming rule. (See *Santa Rosa Junior College v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 345, 348 [220 Cal. Rptr. 94, 708 P.2d 673] ["[U]nless the employer requires the employee to labor at home as a condition of the employment—the fact that an employee regularly works there does not transform the home into a second jobsite for purposes of the going and coming rule"].) Even if the home were a second jobsite, that does not mean that every injury at that site is compensable. If the employee is performing a personal act when injured, the injury would not necessarily be compensable. (Cf. *Bramall v. Workers' Comp. Appeals Bd.* (1978) 78 Cal.App.3d 151, 156-158 [144 Cal. Rptr. 105, 43 Cal. Comp. Cases 288].) Because petitioner raised the "personal convenience" or "personal comfort" doctrine for the first time in his writ petition, the application of that doctrine should not be considered. (Lab. Code, § 5904.) In any event, the gardening at a personal residence is not an act "reasonably contemplated by the employment." (*Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 568 [209 Cal. Rptr. 674, 693 P.2d 254, 49 Cal. Comp. Cases 772].)

The issue here comes down to whether petitioner's act that resulted in his injury—trimming the wisteria—was within the scope of his assigned duties and arose out of those duties. (Lab. Code, § 3600, subdivisions (a)(2)(3).) Petitioner, one of two full time Los Angeles County Fire Department employees on Catalina, was under no obligation to maintain his own personal residence in any particular manner. Respondent had no control over petitioner's residence and never inspected it. Petitioner was required to provide his own living and housing expenses. The wisteria did not prevent petitioner from reaching his fire apparatus. Indeed, he apparently saw no need to deal with it. He only undertook to trim it at his wife's request. As attributed to petitioner, trimming the wisteria improves the appearance of the house. There is no evidence that petitioner's wife or petitioner undertook to cut the wisteria as a safety measure for members of the public who came to the residence for services.

If trimming vegetation in a personal residence arises out of the employment, so would any activity in or around the residence. Under petitioner's rationale, virtually any activity within or on the petitioner's residential property that injured him would be compensable. Thus, I agree with the Board and would not annul its decision.

Mosk, J.