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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT FLORES, *Applicant,* **vs.** **GARNET PROTECTIVE SERVICES AND SECURITY, INC.; JOSEPH'S CAFE, INC.; PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY; and UNINSURED EMPLOYERS BENEFITS TRUST FUND,** ***Defendants.***	**Case No. ADJ2136789 (MON 0357209)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Defendant, Joseph's Cafe, Inc. (Joseph's Cafe), insured by Pennsylvania Manufacturers' Insurance Company (PMIC), seeks reconsideration of the December 5, 2011 Findings and Order, wherein the workers' compensation arbitrator (arbitrator) found that the applicant was an employee of both Garnet Protective Services and Security, Inc. (Garnet) and Joseph's Cafe. The arbitrator found that Garnet had no workers' compensation coverage, and, therefore, pursuant to Insurance Code section 11663, PMIC is liable for workers' compensation benefits. The arbitrator also found that the applicant sustained an injury arising out of and in the course of his employment on July 12, 2007.

Defendant contends that the arbitrator failed to issue his decision within 30 days. Defendant also contends that the arbitrator erred in finding that applicant was an employee of both Garnet and Joseph's Cafe. In the alternative, defendant contends that applicant did not sustain an injury arising out of and in the course of employment because he was on his regular commute.

We have considered the Petition for Reconsideration and we have reviewed the record in this matter. We have received answers from the applicant and the Uninsured Employers Benefits Trust Fund (UEBTF). The arbitrator filed "Report and Recommendation on Petition for Reconsideration" (Report), recommending that the petition be denied.

For the reasons discussed below, we will grant reconsideration, rescind the December 5, 2011 Findings and Order, and find that applicant was solely employed by Garnet. We will also find that applicant did not sustain an industrial injury.

We begin by noting that under Labor Code section 5277(a), "[t]he arbitrator's Findings and Award shall be served on all parties within 30 days of submission of the case for decision[,]" and that under subdivision (e), "[u]nless all parties agree to a longer period of time, the failure of the arbitrator to submit the decision within 30 days shall result in forfeiture of the arbitrator's fee and shall vacate the submission order and all stipulations." In this case, the arbitrator included language in his initial letter to the parties that by proceeding with the arbitration, the parties agreed to waive the requirements of Labor Code section 5277.

EMPLOYMENT

The parties do not dispute that applicant was employed by Garnet. Applicant and UEBTF contend that applicant was also employed by Joseph's Cafe.

Garnet and Joseph's Cafe entered into an agreement in July of 2003 that Garnet would provide security services for Joseph's Cafe. (Exhibit H.) Pursuant to the agreement, Garnet, "acting as an independent contractor, shall staff the Club's Security Program..." (Exhibit H, section 6.2.) Applicant submitted his timesheets to Garnet and was paid by Garnet. (September 9, 2011, Transcript of Arbitration Proceeding, p. 153.) Garnet had the authority to terminate applicant. (Id. at p. 96.)

Applicant testified that he possessed a "guard card" which "allows you to obtain the powers to arrest as a security guard and also be employed by a facility that requires security staff." (Id. at p.22.) Applicant elected to carry a firearm while on duty at Joseph's Cafe. (Id. at p.68.) Applicant provided security services in accordance with a manual provided by Garnet. (Id. at p.209.) Applicant also moved furniture, set up DJ equipment, and cleaned spills. (Id. at pp. 53-54, 57-58, 60.) The owner/manager of Joseph's Cafe, Robert Abrahamian, testified that security guards did not have to help with such tasks, it was not part of their job description and they did so voluntarily. (Id. at pp. 247-249; 252-253.) Mr. Abrahamian would tip the security guards "here and there" if they did a good job on security. (Id. at pp. 252-253.) However, Mr. Abrahamian had no power to fire either individual Garnet security guards or the

whole Garnet security crew, unless he terminated the contract with Garnet. (Id. at pp. 226, 227.) He could only ask Bob Alianz, the owner of Garnet, or applicant, as Garnet's head of security at Joseph's, not to send a particular security guard again. (Id. at pp. 226-227; 230-231.)

Pursuant to Labor Code section 3300, an "employer" includes, in relevant part, every "person . . . which has any natural person in service." (Lab. Code, § 3300(c).) An "employee" is any person "in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed ..." (Lab. Code, § 3351.) Moreover, it is presumed that a person rendering service for another is an employee unless the alleged employer affirmatively proves otherwise. (Lab. Code, § 3357; *Yellow Cab v. Workers' Comp. Appeals Bd. (Edwinson)* (1991) 226 Cal.App.3d 1288 [56 Cal.Comp.Cases 34].)

An employee may have more than one employer. The characteristics of such dual employment are: 1) that the employee is sent by one employer (the general employer) to perform labor for another employer (the special employer); 2) rendition of the work yields a benefit to each employer; and 3) each employer has some direction and control over the details of the work. (*See Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168 [44 Cal.Comp.Cases 134]; *Meloy v. Texas Co.* (1953) 121 Cal.App.2d 691 [18 Cal.Comp.Cases 313]; *Ridgeway v. Industrial Acc. Com.* (1955) 130 Cal.App.2d 841 [20 Cal.Comp.Cases 32]; *Doty v. Lacy* (1952) 114 Cal.App.2d 73 [17 Cal.Comp.Cases 316]; *Caso v. Nimrod Prods.* (2008) 163 Cal.App.4th 881.)

Evidence that the alleged special employer has the power to discharge a worker is strong evidence of the existence of a special employment relationship. (*McFarland v. Voorheis-Trindle Co.* (1959) 52 Cal.2d 698 [24 Cal.Comp.Cases 216].) Other factors to be taken into consideration are "the nature of the services, whether skilled or unskilled, whether the work is part of the employer's regular business, the duration of the employment period,...and who supplies the work tools." (*Kowalski, supra*; *Oxford v. Signal Oil & Gas Co.* (1970) 12 Cal.App.3d 403 [35 Cal.Comp.Cases 790]; *Santa Cruz Poultry, Inc. v. Superior Court (Stier)* (1987) 194 Cal.App.3d 575 [52 Cal.Comp.Cases 429].)

In this case, Garnet and Joseph's Cafe had an agreement that Garnet would supply trained security officers to Joseph's. Applicant was a trained security guard who performed his security guard

duties without direct supervision from anyone at Joseph's Cafe. Security services were not part of Joseph's Cafe's regular business. Applicant supplied his own gun and Garnet supplied applicant with a polo shirt. Although applicant appears to have helped out with some tasks that were outside his security guard duties, he was not expected to perform these tasks. (September 9, 2011, Transcript of Arbitration Proceeding, p. 249.) While Mr. Abrahamian of Joseph's Cafe did exercise a small degree of control over applicant, particularly with respect to his schedule, Mr. Abrahamian did not exercise control over the details of applicant's work and had no right to fire him. Applicant was paid only by Garnet and, although Mr. Abrahamian would occasionally tip the security guards, these tips were entirely gratuitous. Therefore, we will find that applicant was employed only by Garnet and not by Joseph's Cafe.

AOE/COE

Applicant generally worked Friday, Saturday, Sunday, and Monday nights from 9 p.m. to 2 a.m. (September 9, 2011 Transcript of Arbitration Proceeding, pp. 30-31.) Approximately five or six times a year, applicant would work an additional night. (Id. at 43.) Applicant testified that on Thursday, July 12, 2007, he was getting ready to leave his day job, when he received a phone call from Mr. Abrahamian asking him to report to work that night. (Id. at p. 45) Applicant stated that he went home, took a nap, to get shower, got on his motorcycle and headed to work. (Id. at 47) He was involved in a motor vehicle accident on his way to work.

With respect to whether applicant's injury is employment related, we begin our analysis with Labor Code section 3600 which imposes liability on an employer for workers' compensation benefits only if its employee sustains an injury "arising out of and in the course of employment." Whether an injury arises out of and in the course of employment requires a two-prong analysis. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].)

First, the injury must occur "in the course of employment," which ordinarily "refers to the time, place, and circumstances under which the injury occurs." (*LaTourette v. Workers' Comp. Appeals Bd., supra*, 63 Cal.Comp.Cases at page 256.) An employee is acting within "the course of employment" when "he does those reasonable things which his contract with his employment expressly or impliedly permits him to do." (*Ibid.*) An employee necessarily acts within the "course of employment" when

"performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied." (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729 [48 Cal.Comp.Cases 326, 328].)

Second, the injury must "arise out of" the employment, "that is, occur by reason of a condition or incident of employment." (*Employers Mutual Liability Ins. Co. of Wisconsin v. I.A.C. (Gideon)* (1953) 41 Cal.2d 676 [18 Cal.Comp.Cases 286, 288].) "[T]he employment and the injury must be linked in some causal fashion," but such connection need not be the sole cause, it is sufficient if it is a contributory cause." (*Maher v. Workers' Comp. Appeals Bd., supra*, 48 Cal.Comp.Cases at page 329.)

The "going and coming" rule excludes from compensability injuries that occur while the employee is going to or returning from work in the routine commute. (*Ocean Acc. & Guarantee Co. v. I.A.C. (Slattery)* (1916) 173 Cal. 313.) That is, injuries sustained during a local commute to or from a fixed place of business at fixed hours are not compensable. (*Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150, [37 Cal.Comp.Cases 734].) The rationale for this judicially created doctrine is that during an ordinary commute, the employee is not rendering any service for the benefit of the employer. (*City of San Diego v. Workers' Comp. Appeals Bd. (Molnar)* (2001) 89 Cal.App.4th 1385 [66 Cal.Comp.Cases 692].)

However, there is an exception to the "going and coming" rule if the applicant is on a special mission or errand. A "special mission" occurs when the employee is invited or required by the employer to perform an activity that is within the course of the employment, but is unusual or extraordinary in relation to the employee's routine duties. (*Molnar, supra*, 89 Cal.App.4th 1385 [66 Cal.Comp.Cases 692, 693].) "The special mission exception requires three factors to be met, (1) the activity is extraordinary in relation to the employee's routine duties, (2) the activity is within the course of the employee's employment, and (3) the activity was undertaken at the express or implied request of the employer and for the employer's benefit." (*City of Los Angeles v. Workers' Comp. Appeals Bd. (DeLeon)* (2007) 157 Cal.App.4th 78 [72 Cal.Comp.Cases 1463, 1467].) Depending on the circumstances of the case, working at an unusual time, performing unusual duties, or working unusually extended hours may be extraordinary activities in relation to the employee's routine duties. (*Dimmig v. Workers' Comp. Appeals*

Bd. (1972) 6 Cal.3d 860, 866-867 [37 Cal. Comp. Cases 211, 216-217]; *Schreifer v. Industrial Acc. Com.* (1964) 61 Cal.2d 289, 295 [29 Cal. Comp. Cases at p. 107]; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528 [45 Cal. Comp. Cases 410, 416].) Although the special mission exception is ordinarily inapplicable when "the only special component is the fact that the employee began work earlier or quit work later than usual, the special mission exception applies when the employer has requested the employee to arrive earlier than usual for an extraordinary purpose." (*General Ins. Co. v. Workers' Comp. Appeals Bd.* (*Chairez*) (1976) 16 Cal.3d 595, 601–602 [41 Cal.Comp.Cases 162].)

In this case, except for the fact that applicant was not working a regular night, he was on his regular and typical. There is no evidence that applicant's job duties on his extra shift would have been different from an ordinary shift. Applicant regularly worked these extra shifts five or six times a year. Merely working an extra shift is not an extraordinary activity in relation to applicant's routine duties. (Cf. *Molnar*, *supra,* 89 Cal.App.4th 1385 [66 Cal.Comp.Cases 692] ("special mission" exception not apply to police officer commuting to testify in court on a day he was not normally scheduled to work, where testifying in court was part of officer's routine duties and it was not unusual for officers to be called to testify on days they were not scheduled to report to the police station).) Therefore, we will find that the applicant did not sustain an industrial injury.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the December 5, 2011 Findings and Order is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 5, 2011 Findings and Order is **RESCINDED,** and the following Findings of Fact and Order is **SUBSTITUTED** in its place:

FINDINGS

1. On July 12, 2007, the applicant was employed by Garnet Protective Services.
2. The applicant did not sustain an injury arising out of and in the scope of his employment with Garnet Protective Services on July 12, 2007.

ORDER

IT IS ORDERED that the applicant shall take nothing by reason of his claim.

WORKERS' COMPENSATION APPEALS BOARD

RONNIE G. CAPLANE, Chairwoman

I CONCUR,

FRANK M. BRASS, Commissioner

I DISSENT IN PART. (SEE ATTACHED CONCURRING AND DISSENTING OPINION)

DEPUTY

NEIL P. SULLIVAN, Deputy Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 2 7 2012

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

BRADFORD & BARTHEL
CHUDACOFF, SIMON & FRIEDMAN
ROSE, KLEIN, MARIAS, ET AL
OD LEGAL, LOS ANGELES
ROBERT FLORES
SOBELSOHN & JOHNSON, ATTN BERNARD SOBELSOHN, ARB.

MWH/ebc

CONCURRING AND DISSENTING OPINION

I concur with the majority that applicant was solely employed by Garnet. However, I dissent on the issue of industrial injury. Applicant's commute was undertaken because his employer made a special request that he work on a day he did not ordinarily work. Therefore, I would find that applicant's accident falls within the "special mission" exception to the "going and coming" rule and is compensable as against Garnet.[1]

Absent special circumstances, the "going and coming" rule ordinarily makes non-compensable an injury sustained during a normal commute to from work by an employee who has a fixed place of work and fixed work hours. (*Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 157 [37 Cal. Comp. Cases 734, 739]; accord: *Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 564-565 [49 Cal. Comp. Cases 772, 774]; *Parks v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 585, 589, fn. 1 [48 Cal. Comp. Cases 208, 209, fn. 1]; *General Ins. Co. v. Workers' Comp. Appeals Bd. (Chairez)* (1976) 16 Cal.3d 595, 598 [41 Cal. Comp. Cases 162, 163].) The "going and coming" rule essentially derives from the fact that, under California law, a condition of compensation is that the employee must be "performing service" to the employer at the time of injury and must be "acting within the course of his or her employment." (Lab. Code, § 3600, subd. (a)(2).) The courts have concluded that, generally, an employee is not rendering any service to the employer, and the employment relationship is suspended, from the time the employee leaves his work to go home until he resumes his work. (*Santa Rosa Junior College v. Workers' Comp. Appeals Bd. (Smythe)* (1985) 40 Cal.3d 345, 352 [50 Cal. Comp. Cases 626, 630]; *Zenith National Ins. Co. v. Workmen's Comp. Appeals Bd. (DeCarmo)* (1967) 66 Cal.2d 944, 947 [32 Cal. Comp. Cases 236, 237]; *Kobe v. Industrial Acc. Com. (Ruble)* (1950) 35 Cal.2d 33 [15 Cal. Comp. Cases 85, 86-87].)

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[1] It was Mr. Abrahanian of Joseph's Cafe who called applicant to work the extra day. However, this was because applicant was the "head" of the Garnet employees who did security at Joseph's and because it was often easier and quicker to contact applicant than Bob Alianz, particularly on the July 12, 2007 date of the accident, when Mr. Abrahanian did not even place a call for security guards until 4:45 pm. (September 9, 2011, Transcript of Arbitration Proceeding, at 219:25-220:14; 221:10-221:23; 235:12-235:23; 237:5-238:22; 241:5-241:18; 242:15-243:8; 244:2-244:11.) Therefore, on the day of the July 12, 2007 accident, applicant was in effect the managing agent or foreman of Garnet who, on behalf of Garnet, scheduled himself to work at Joseph's Cafe.

It is well recognized, however, that there are numerous exceptions to the "going and coming" rule. (E.g., *Bramall v. Workers' Comp. Appeals Bd.* (1978) 78 Cal. App.3d 151, 156 [43 Cal. Comp. Cases 288, 291].) Moreover, it is clear that in resolving any question about whether the "going and coming" rule bars compensation in a particular case, any doubts as to the rule's application must be resolved in favor of compensability. (Lab. Code, § 3202; *Price v. Workers' Comp. Appeals Bd., supra,* 37 Cal.3d at p. 565 [49 Cal. Comp. Cases at p. 775]; *Hinojosa v. Workmen's Comp. Appeals Bd., supra,* 8 Cal.3d at pp. 155-156 [37 Cal. Comp. Cases at p. 737]; *Dimmig v. Workers' Comp. Appeals Bd.* (1972) 6 Cal.3d 860, 866-867 [37 Cal. Comp. Cases 211, 216-217]; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528 [45 Cal. Comp. Cases 410, 416]; *Bramall v. Workers' Comp. Appeals Bd., supra,* 78 Cal.App.3d at p. 158 [43 Cal. Comp. Cases at p. 292].)

One of the exceptions to the going and coming rule is the "special mission" exception. Under the "special mission" exception, an injury sustained by an employee during his or her regular commute is compensable if he or she had been performing a special mission for the employer. *(Chairez, supra,* 16 Cal.3d at p. 601 [41 Cal. Comp. Cases at p. 165].) Although an employee's activity has been described as "special" if it is "'extraordinary in relation to routine duties, not outside the scope of employment'" (*Chairez, supra,* 16 Cal.3d at p. 601 [41 Cal. Comp. Cases at p. 165] (emphasis added), quoting from *Schreifer v. Industrial Acc. Com.* (1964) 61 Cal.2d 289, 295 [29 Cal. Comp. Cases at p. 107]; see, also, *Pointer, supra,* 104 Cal.App.3d at p. 536 [45 Cal. Comp. Cases at p. 415]), the special mission exception may apply even though the task performed is not unusual for the employee. (*Dimmig, supra; Pointer, supra; Schreifer, supra).*

Thus, in *Dimmig,* an injury sustained by an employee while returning home from night school was within the "special mission" exception where the employer encouraged it employees to further their education "in order to perform more effectively in their present jobs and increase their qualification and knowledge for advancement" and where the employer reimbursed tuition and textbook costs. The Court concluded that "[t]he fact that Dimmig's attendance at the college may have been routine... does not affect the character of the activity as special. The school attendance was extraordinary in relation to Dimmig's routine duties..." (6 Cal.3d at p. 869 [37 Cal. Comp. Cases at pp. 218-219].)

In *Pointer*, an unknown assailant attacked an employee when the employee got out of his car to go to his house after working a double shift. In finding that the injury was within the "special mission" exception, the Court observed that that was the extra duty "was at the employer's request and satisfied an important out-of-the ordinary business need." (*Pointer,* 45 Cal. Comp. Cases p. 415.) The Court's conclusion was not affected by the fact that overtime work was not unusual and that applicant had worked overtime on 15 occasions during the six months preceding his injury (although never as long as the night of his injury). (*Pointer,* 45 Cal. Comp. Cases at p. 415-416, fn. 4.)

Similarly, in *Schreifer,* the applicant was a deputy sheriff who had irregular shift hours, but these irregular hours were nevertheless scheduled in advance (i.e., they were posted a day ahead). In addition, applicant was on call 24 hours and periodically received calls to come in at unscheduled times. When the applicant was injured while en route to work after receiving a call instructing him to come in early, his injury was found to be compensable. The Court observed that "[n]early every employment relationship contemplates that extraordinary needs may arise and must be met." *(Schreifer,* 29 Cal. Comp. Cases at 107.) The Court also observed that the "telephonic order from (applicant's) supervisor to report early" indicated that "[t]here must be have been some special need for [applicant's] services at that time." (*Id.)* Therefore, "[m]aking the trip at that time was a special service." (*Id.)*

Here, on the date of his injury, applicant was not working his usual "fixed hours." Instead, at the special request of his employer, he was working an extra shift on a different day. Thus, by commuting to and from work for this extra shift, applicant was on a special mission for his employer. As in *Dimmig, Pointer,* and *Schreifer*, the fact that it was not unusual for applicant to work additional days does not change the result, because the extra work was "extraordinary in relation to his routine duties."

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I would affirm the arbitrator's decision that the applicant sustained an industrial injury, although I agree with the majority that applicant was employed only by Garnet.

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY

NEIL P. SULLIVAN, Deputy Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 27 2012

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

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MWH/ebc