

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**BRADEN NANEZ, *Applicant***

**vs.**

**3 STONEDEGGS, INC.;**  
**TECHNOLOGY INSURANCE COMPANY, Adjusted by AMTRUST NORTH**  
**AMERICA, *Defendants***

**Adjudication Number: ADJ14015513**  
**Redding District Office**

**OPINION AND DECISION AFTER  
RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O) issued on August 11, 2022, wherein the workers' compensation administrative law judge (WCJ) found that applicant (1) did not sustain injury arising out of and in the course of employment (AOE/COE); (2) violated company policy when he left the worksite without permission on the date of his injury; and (3) was engaged in a material deviation and complete departure from his employment at the time of injury.<sup>1</sup> The WCJ ordered that applicant take nothing on his workers' compensation claim.

Applicant contends that the evidence establishes that he was engaged in an activity reasonably expected to be incident to his employment at the time of his injury.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be deemed timely and otherwise be denied.

We have reviewed the Petition for Reconsideration, the Answer, and the contents of the Report. Based upon our review of the record, and as discussed below, we will rescind the F&O, substitute findings that the commercial traveler rule applies to applicant's accident, that applicant's

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<sup>1</sup> The parties filed separate pleadings on the issue of whether the Petition should be deemed timely. Since WCAB Rule 10964(a) requires permission from the Appeals Board for filing supplemental pleadings only where "a petition for reconsideration . . . has been timely filed" and the issue of timeliness is now before us, we do not view the separate pleadings as supplemental pleadings and consider them in their entirety. (See Cal. Code Regs., tit. 8, § 10964.)

claim is not barred by the going and coming rule and intoxication, that applicant sustained injury AOE/COE in the form of a fracture to the right femur, and that the issues of whether applicant sustained injury in the form of a traumatic brain injury and bruised lung are deferred, and we will return the matter to the trial level for further proceedings consistent with this decision.

### **FACTUAL BACKGROUND**

On April 26, 2022, the matter proceeded to trial as to the following issues: “Injury arising out of and in the course of employment per Labor Code section 3600(a), (the going and coming rule); and intoxication.” (Minutes of Hearing and Summary of Evidence, April 26 2022, p. 2:15-16.)

The parties stipulated that while employed by defendant as a caterer/food assembler/kitchen worker at State Highway 263/Shasta River Bridge on October 5, 2020, applicant claims to have sustained injury AOE/COE in the form of a traumatic brain injury, fractured femur, and bruised lung. (*Id.*, p. 2:4-7.)

The WCJ admitted the Statement of Jesse Rice dated October 15, 2020; the Statement of James Todd, undated; the Statement of Kyle Brossard dated October 6, 2020; and the Statement of Brandon Duarte dated October 4, 2020 and October 5, 2020 into evidence. (*Id.*, p. 3:2-14.)

The Statement of Jesse Rice provides as follows:

Braden Nanez was hired by me to come assist us with a fire camp assignment in Brownsville, CA . . .

I explained to him the nuances of working at a fire camp as an employee of ours since we were contracted by the US Forest Service. Two of the big issues we discussed were whether he would prefer to commute to the site and work either AM or PM shift or if he would like to stay on site and work both. He decided to stay on site as he was hoping to get as many hours as possible. The other big issue we discussed was rules while at fire camp. We discussed making sure to be wearing a mask due to COVID, the important of following food safety protocol such as hand washing, and personal conduct. I explained to him this was like being on government property and that we had to be very aware of our actions whenever at camp. He was told alcohol and drugs weren't allowed at any time while working or before working.

Braden worked at the camp in Brownsville and excelled with in the team. He always had a good attitude and seemed eager to learn. Towards the end of September, we had the opportunity to set up another camp in Happy Camp, CA. We asked employees if anyone would like to come up there and stay for a while since it looked like this could be a 3-6 month job. Braden volunteered to be part of the team to go up there along with two other team members. Kyle Brossard, Brandon Duarte, and me left on 9/28 to go up to Happy Camp. The plan was for Braden to meet us up there the

following day. He had gone home from Brownsville to take a day to rest, do laundry, and pack an additional supplies he needed. He left the morning of the 29th to meet us in Happy Camp and arrived some time that afternoon.

With this new camp and the expected duration, we made sure to try to make the situation as comfortable as possible for all the employees. Kyle Brossard was put in charge of daily operations at this site. We provided an RV trailer so the team would have a place to relax and sleep. I also loaded the trailer with hygiene supplies, drinks, as well as a TV and DVD player so they had something to keep them busy. We explained to them to make sure if they needed anything and they couldn't get it in town to please let me know and we would send it up with the supply truck that came every few days. Due to the remote nature of Happy Camp we wanted to limit any drives into town if possible by the team.

On 10-5-20 I received word from our onsite manager Kyle that Braden had went into town. I asked him what for as we had not wanted anyone driving into Yreka unless needed. He stated that Braden had left after breakfast service without saying anything to him or Brandon. He got a text in the afternoon from Braden saying he missed the Exit and would be there in a few hours. I spoke to Kyle that afternoon and he let me know that Braden had left camp. I planned to make sure either myself or James Todd one of our other managers who was going up there sat him down and explained again our desire for him to not leave camp for safety reasons.

Around 8pm I received a text from Kyle saying Braden still hadn't returned. At this point I became concerned and started to call local law enforcement in Yreka. I reached the CHP Yreka office and inquired if a Braden Nanez had been arrested or involved in any traffic collisions. The operator let me know he had and that he had she put me in contact with the on-duty officer who was at this scene. I notified the team in Happy Camp and reached out to the hospital in Redding where he was taking. They were able to tell me very few details, however they provided me his Mother's contact info. I spoke with her that evening to check his condition. I then held a conference call with Kyle, James, and Brandon in Happy Camp letting them know the details I had and explaining that I only wanted them to drive during full day time hours and only for essential business moving forward.

(Ex. 1, Statement of Jesse Rice, October 15, 2020, pp. 2-3.)

The Statement of James Todd provides as follows:

Braden first started working for us at our fire camp kitchen in Brownsville. Right out the gate we could all tell he was a great addition to our team. In the line of work we do, we are at fire camp for several weeks. We were at this first fire camp for about a month and halfway through we were letting local people who wanted to go home for a few days, do so.

One of the first times Braden went home, he just wanted to go home for a day to do laundry and grab a few more clothing items. Since we had enough personnel, I told

him he could leave after breakfast and come back the next following afternoon. Braden left on the night and then came back before the next morning breakfast at around 4:30am. This meant he would have had to leave his house around 3 am. Being that I was a truck driver/heavy equipment operator in the Army and a CDL driver for California Sandwich Company, I take safety very seriously and it is important to me. I tell almost all my employees to never drive tired, no job is worth your life. So after Braden came back that morning, I had to have that first big safety conversation with him and asked him why he had come back so early, I had already told him I didn't need him for breakfast. He said something along the lines of he finished what he wanted to do so he just wanted to be back at camp for the hours and was worried about the team being short staffed. I then told him the roads into this fire camp were dark and windy and I did not want him driving them at that hour. I also knew how hard he had been working the two weeks prior to that day and that he surely must have been tired and I did not want him driving while tired.

The next time we had a conversation about safety was when half the team was leaving Brownsville to set up a new Camp in Happy Camp. We had all been working long hours and working hard so I asked him to get some sleep before going home to Chico then going to Happy Camp. I was still unsure of the game plan if he was going that day so I had a conversation with him about not driving while tired again. I said no matter what if anyone wants him on the road before he feels safe to drive then he was not to drive, and they could take it up with me. Again I made it clear the importance of safe driving because in the military before any long drive we would have a safety briefing, and this was essentially what I was discussing with Braden. There were no worries that day because all of us managers-Jesse, Kyle and me were on the same page that there was no point of Braden driving that same day. After this discussion, I knew that we had to be on a clear stance about how we felt about safe driving as a company.

Brownsville camp finally closed a week later while the guys had got Happy Camp up and running. My new role was to be doing supply runs out to the camp since they didn't need a ton of employees. I asked Kyle to get a list of items the guys wanted, and I would pick it up for them. Since Jesse already bought the guys warm socks and other bathroom essentials, they said they were good and not needing anything. I was arriving the same day as Braden's accident. I got stuck on the highway as they cleaned up the debris from the accident, I had no idea that it was Braden's car they were towing off the road. When I got to camp late, Kyle was stressing and worried because Braden was not back yet. He said Braden had texted him right before I was stuck in all that traffic around 3 o'clock.

Later that night after we found out it was his accident I spoke with Brandon, Braden's coworker at Happy Camp. Brandon told me that they had all finished the breakfast shift and then Kyle and Brandon went to bed before Braden, since they started much earlier than Braden.

Braden must of stayed up and finished his remaining work and since he didn't have service at the camp he probably drove into town to get service to make some phone calls. Kyle told me Braden did not bring it up with him about leaving camp first and that if it was brought up, Kyle would have talked him out of going. Kyle had service and would have let Braden use his phone and he was already letting Brandon use it so it wouldn't of been an issue.

I think Braden is an Amazing young man. Everyone only has great things to say about him. I just wished he would of talked to one of us before leaving camp. He knew I could bring him anything he needed and Kyle and I never made it an issue to wake us at Brownsville if anyone needed anything. Although I wasn't there quite yet, I imagine this was the same way Kyle was running Happy Camp. I was also arriving with a Verizon hotspot that Braden could have used to get service that day. I am constantly thinking and praying for him. I am hopeful that he pulls out of this. (Ex. 2, Statement of James Todd, undated, pp. 2-3.)

The Statement of Kyle Brossard provides:

Employee Braden Nanez went to bed at 10:00 pm the night before the accident. Woke up for his shift at 4:45 am and left to town after his Breakfast shift at 8:45 am. Brayden didn't mention anything about needing to leave or tell me he was leaving camp. Instead I woke up at 2 pm and received a text that said he drove past the exit and should be there around 4 pm. Being down one of our three employees led to a very busy and hectic shift and we tried to get a hold of him to make sure he is okay. When it slowed down around 8 pm I called my boss who called the police and they told us he had been in an accident and was airlifted to a hospital in Redding. The accident took place at the sharp corner where the highways change between Yreka and Happy Camp. He had drifted into the oncoming traffic lane and hit a van head on.

(Ex. 3, Statement of Kyle Brossard, October 6, 2020, p. 2.)

The Statement of Brandon Duarte provides:

0/4/2020 - I woke up at about 3:30am and began work in the kitchen Braden must have woken up by 4:00am because I saw him by 4:15. We all finished up at around 9:30am with breakfast then we had a few things to do before we hit the sack. When I woke up Braden was in his bunk, he did not start for another 30min or so. After dinner I went to bed and Braden and I had discussed in detail my rope swing accident when I was young, and how one bad decision changed my life and how I am from this county and how I don't trust my wife to drive here to see me because of how dangerous the roads can be. We had also had a discussion about the potential consequences that smoking weed at camp could bring about.

10/5/2020 - i woke up at 3:30am and began work in the kitchen. Braden woke up at about 4:45. we worked until about 9:00am then we all went up the street where we bought some groceries. When we got back to camp we all split up I had presumed we were all going to bed however Braden left in his car he didn't say much about it I didn't realize he was gone until I woke up and he wasn't in his bunk or in his car.

We did not find out until some time after he had been involved in fact as soon as we closed after dinner we found out.

(Ex. 4, Statement of Brandon Duarte, October 4-5, 2020, p. 2.)

The WCJ also admitted the records of Mercy Medical Center of various dates. (Minutes of Hearing and Summary of Evidence, April 26 2022, p. 3:2-14.) The records show that applicant was admitted on October 5, 2020 following a motor vehicle accident and the following clinical impression was noted:

1. Severe closed head injury.
2. Questionable Pulmonary Contusion.
3. Right proximal femur fracture.

(Ex. D, Mercy Medical Center Records-Variou Dates, p. 59.)

At trial, Jesse Rice testified as follows:

Q. What were the expected shifts at Happy Camp?

A. So the numbers there were going to be very low. It was only going to be approximately 150 personnel we were supporting. And so the shifts were only going to be roughly five to six hours in the morning and then five to six hours in the evening, similar to Brownsville. But the numbers were very low. Our first meal period, I think we served 40 people. So there wasn't much work to be had at first.

(Partial Transcript of Proceedings, April 26, 2022, p. 7:1-8)

Q. And so when Braden arrived at Happy Camp around September 29th, the expectation was that he was to remain at camp; is that correct?

A. Yes, ma'am.

Q. And if someone needed to leave camp, was it expected that they would tell you or another manager?

A. Yeah. So the expectation we had laid out and we lay out at all our camps is basically if someone needs to leave for a personal reason, we always attempt to give them the shift off -- sorry -- the shift before they leave off.

So say they were to leave at night, they would take the morning shift off. If they were to leave in the morning, they would take the night shift off. So that way they could get additional sleep before traveling. But at no time was anyone supposed to leave camp without checking in with a supervisor and usually arrange that ahead of time multiple days.

(*Id.*, pp. 8:22-9:12.)

Q. And have you had any specific discussions with Braden regarding not driving at any time?

A. I believe those discussions were had with other managers, so I don't want to speculate on my direct involvement as I wasn't the full-time supervisor there. However, I do know there was an instance in Brownsville where he had went home for a day to grab more supplies and was told to come back in the afternoon and instead came back in the morning, which wouldn't have allowed him any time to sleep. And it was told to me that it was discussed with him not to do that because he should not be driving without sleep. But, again, I believe that the discussion was with James or Kyle, and I do not know the specifics of it. I was told that secondhand when we were discussing general issues at the camp.  
(*Id.*, p. 11:9-22.)

Q. So there was no expectation or -- that an employee would leave the camp?

A. No employee should be leaving the camp for any -- definitely for any work-related business like that. We generally have -- we have full-time drivers -- or we had full-time drivers. We had managers. So the expectation was they would handle any pickups, any needs like that.  
(*Id.*, p. 13:17-23.)

Q. Okay. In that statement -- and I'll read it to you. Towards the end of September, we had the opportunity to set up another camp in Happy Camp, California. We asked employees if anyone would like to come up there and stay for a while since it looked like this could be a three- to six-month job. And when you were asking people if they wanted to come up there, including Braden, did you tell them that this was going to be a three- to six-month job?

A. Yeah. The discussion was had with the employees. Due to the numbers, you know, only feeding a hundred, a hundred and fifty people, it wouldn't have been as enticing due to the numbers to do an incident like that that was short duration due to the mobilization costs. And so that was the one thing that we were enticed -- or made us interested in going all that way was the potential duration. And so that was discussed. And that's why we asked the team in Brownsville if anyone would be willing to go. Because if we weren't going to get people to commit for a long duration -- we were afraid that if it went into the holidays, it could have been problematic as people needed to go home, and we would have needed people to stay during the holidays. So we were very clear about the duration on this.

Q. Okay. And Braden volunteered to do that, correct?

A. Correct. Yes.

Q. Okay. And then you go on to state that Kyle Brossard, Brandon Duarte, and me left on 9/28 to go up to Happy Camp. Braden was to meet us up there the following day. Let me ask you this first, Mr. Rice. When you went up on the 28th, how long did you stay up there at Happy Camp?

A. I would have to look at my text messages. I don't recall the specific dates. I believe it was for a few days. But, again, I don't remember the specifics. We were working multiple fires throughout the region and throughout the West Coast. And so I was managing multiple camps in multiple regions.  
(*Id.*, pp. 15:10-16:20.)

Q. Now, you go on to state in your October 15, 2020 statement that the plan was for Braden to meet us up there the following day. That would be the morning of September 29th. And indeed was that the plan, that Braden would drive his car up to Happy Camp?

A. Yeah. So what the discussion was, I believe, was that with Braden living locally near Brownsville, he needed to go home and either do laundry or pack additional clothing and supplies. And so the plan was for him to go home and get retooled, essentially, and meet us up there. Kyle and Brandon both didn't live locally. They had everything they needed. And I knew I was only going to be up there for a short duration before I returned home, so I didn't need to go resupply. So, yeah, Braden was supposed to go home and repack and then meet us up there the following day after he got some sleep.

Q. And you were comfortable with the idea that he was going to be driving up from Chico up to Happy Camp?

A. Yeah. Yeah. There was all main highways for the most part. I mean, it's all main highways. So he said he had a valid driver's license and he had a vehicle. And so my assumption was that he was able to manage driving on major interstates and highways.  
(*Id.*, pp. 17:19-18:16.)

Q. Do you know whether Braden had cell phone service?

A. I don't know for sure. I've had it commented to me that he might not have from Kyle, the on-site manager. But I don't know for sure. I don't know what kind of phone service he has.

Q. Now, I think you testified to this in answer to Ms. Hamilton's questioning. But am I correct in my understanding that between approximately nine in the morning when the breakfast shift was done and four in the afternoon when the dinner shift began, that that was leisure time for the employees, including Braden?

A. Yeah. So it varied for different employees. Basically whoever is first up in the morning was first to go to bed. So Braden was usually woken up later, usually at the start of breakfast, and then he would stay on after breakfast service stopped to continue on with the cleaning, doing dishes and that sort of work. So sometimes it would be 9:30 or 10. It just depended on how long it took to get the cleaning complete.



(*Id.*, p. 19:1-19.)

Kyle Brossard testified as follows:

Q. What was your title or position when you were working there?

A. I was the manager on site.

Q. Did you have any discussions with Braden while at Happy Camp about not leaving the camp site?

A. When we first got there, we talked to everybody and said that we didn't want anyone leaving camp if they don't have to, and we would purchase anything they could need. We bought coats, blankets, sweaters, anything people could think of.  
(*Id.*, p. 23:6-11.)

Q. You testified that you didn't want anyone leaving camp if they didn't have to. Am I correct that that was for safety reasons?

A. Yeah. It was -- it was just -- we were expecting to be there for a long time. And eventually it was going to snow, and so we just did not want people driving on those roads at all. They're very -- like in the middle of nowhere. No cell service. And we didn't want to stress or worry about people. So we really encouraged people not to drive on the roads and try to do our best to get them whatever they could need.  
(*Id.*, p. 27:5-16.)

Brandon Duarte testified as follows:

Q. And do you remember having any discussions with Mr. Nanez regarding driving the roads or anything in that fashion?

A. I personally didn't talk to really anybody about the driving because that wasn't really my department.  
(*Id.*, p. 36:11-15.)

In the Opinion on Decision, the WCJ states that defendant's intoxication defense lacks support and that the situation presented does not implicate the going and coming rule. (Opinion on Decision, August 11, 2022, pp. 3-4.)

In the Report, the WCJ states:

The employer's business was to provide food service to firefighters and forestry workers at various locations. The employer won a contract to provide food service at a remote location near Happy Camp, California, and it was expected that the job would last 3 to 6 months (Partial Transcript of Proceedings, Testimony of Jesse Rice, page 8: 1-3). . . .

On the day of the accident, the applicant left camp after his morning shift without informing anyone he was leaving, or the purpose of his exit from camp (Testimony of Kyle Broussard, Transcript, page 23:11-23). . . . The employer's on site manager knew of no work related reason the applicant needed to leave camp . . . The accident in question occurred on the applicant's way back from, presumably, Yreka.

. . .  
[T]he matter was submitted for decision on 5/23/22. The decision issued 8/11/22. Applicant's counsel had requested service through EAMS by email, and that service was, according to EAMS records, performed as requested on or about 8/11/22.

After that, things become uncertain. Applicant's counsel's office waited until 9/15/22, when, not being aware of receiving a decision in the case, checked EAMS and found out the decision had issued on 8/11/22. This is a span of 35 days between the service (supposedly) by EAMS and applicant's counsel's office's first effort to determine where the settlement was. . . .

Applicant's counsel filed a document he titled a Petition for Leave to File the Petition for Reconsideration More Than 20 Days After Mailing, on 9/27/22.

Applicant's counsel filed his Petition for Reconsideration of the Findings and Order on 10/3/22.

. . .  
Here, EAMS records note that the decision of 8/11/22 was emailed to the address that the applicant's counsel provided. Further, it seems from the applicant's counsel's representations in his petition for more time, other than this one example, his office regularly receives emails from EAMS without problems.

Here, the Findings and Order seems to have vanished into the ether after EAMS emailed it to the AA. . . . [T]he applicant's attorney's appears to have delegated the watch for documents from the board via email to a firm employee, and the technical email handling to a local IT provider. The IT provider speculated that the document may have been quarantined by firewall software, but could not confirm that. . . .

[I]t is likely that any busy law office delegates at least part of the duty of watching for service via email to a trusted employee, and that the use of an outside IT provider for email management is common. Further, the credibility of applicant's counsel, Robert Davis, is unimpeachable. If he says his office didn't get the Findings and Order, then that is what happened. . . .

[A]pplicant's counsel has credibly stated that his office did not receive service. This sort of event has never happened, to this judge's knowledge, on any prior occasion with this law office. The applicant's rights to appeal here should not be terminated because of what it is reasonable to presume is a technical error in the receipt of email.

Therefore, in the interests of fairness and protection of the rights of any party to due process, for these reasons this judge recommends that the applicant's petition to be granted additional time to appeal, essentially from the date he became aware of the findings and order, be granted.  
(Report, pp. 2-4.)

### DISCUSSION

A petition for reconsideration must be filed and received by the Appeals Board within twenty days of the service of the final order (plus an additional five days if service of the decision is by any method other than personal service, including by mail, upon an address in California). (§ 5903; Cal. Code Regs., tit. 8, former § 10507, now § 10605 (eff. Jan. 1, 2020); *Oliver v. Structural Services* (1978) 43 Cal.Comp.Cases 596.) This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely Petition for Reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

In this case, as stated in the Report, applicant's attorney asserts that his office did not receive service of the F&O until September 15, 2022, thirty-five days after the August 11, 2022 service of the F&O. (Report, p. 2.) The WCJ found these assertions credible, and based upon the WCJ's reasoning, we conclude service of the F&O was defective. (Report, p. 3.)

If a party has not been properly served with an order, the time limit for filing a petition for reconsideration of the order begins to run when the order is received. (*Hartford Accident & Indemnity Co. v. Workers' Comp. Appeals Bd. (Phillips)* (1978) 86 Cal.App.3d 1 [43 Cal.Comp.Cases 1193].) Here, applicant's attorney received the F&O on September 15, 2022 and filed the Petition on October 3, 2022, or eighteen days after receipt. (Report, p. 3.) Thus the Petition was filed within the statutory period and is timely. Accordingly, we will evaluate its merits.

Applicant contends that the evidence establishes that he was engaged in an activity reasonably expected to be incident to his employment at the time of his injury, and, therefore, that the commercial traveler rule applies to his accident.

A "commercial traveler is regarded as acting within the course of his employment during the entire period of his travel upon his employer's business." (*Wiseman v. Industrial Acc. Comm.*

(1956) 46 Cal.2d 570, 572 [21 Cal.Comp.Cases 192].) The Supreme Court has made clear that, "[i]n the case of a commercial traveler, workers' compensation coverage applies to the travel itself and also to other aspects of the trip reasonably necessary for the sustenance, comfort, and safety of the employee." (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 652 [63 Cal.Comp.Cases 253].) As the Court of Appeal observed, an employee away on business can "hardly [be] expected to remain holed up in his hotel room." (*Fleetwood Enterprises, Inc. v. Workers' Comp. Appeals Bd. (Moody)* (2005) 134 Cal.App.4th 1316, 1327 [70 Cal.Comp.Cases 1659].)

The test is whether the activity during the injury is one "that an employer may reasonably expect to be incident to its requirement that an employee spend time away from home." (*IBM Corp. v. Workers' Comp. Appeals Bd. (Korpela)* (1978) 77 Cal.App.3d 279, 283 [43 Cal.Comp.Cases 161].) This rule is construed liberally in favor of injured employees. (*Korpela, supra*, at p. 282 (citing Labor Code section 3202); see also *Great Divide Insurance Company v. W.C.A.B. (Melendez Banegas, Edil David)*, 2022 Cal. Wrk. Comp. LEXIS 66 (Cal. App. 1st Dist. October 20, 2022) [writ den.] (stating that the "reasonable expectancy" test for application of the 'commercial traveler' doctrine" is whether injury occurred during activity which the employer reasonably expected to be incident to its requirement that the employee spend time away from home on its project and not while engaged in a distinct departure or deviation from employment).)

In *Korpela*, the issue presented was whether an employee's death from an automobile accident while on a weekend trip to visit relatives during the course of an out-of-town training program was compensable under the commercial traveler rule. Evaluating whether the weekend trip was within the course of employment or a non-compensable "distinct departure on a personal errand," the court found that the weekend trip was a leisure time activity normally incident to an out-of-town temporary assignment, a conclusion further supported by the fact that the employee's supervisor knew of the visit and encouraged it. (*Korpela, supra*, at p. 283.)

Similarly, in *Hanford Cmty. Med. Ctr. v. Workers' Comp. Appeals Bd.*, 81 Cal.Comp.Cases 1039, 2016 Cal. Wrk. Comp. LEXIS 118 [writ den.], the Court of Appeal upheld the WCAB's finding that an employee's accidental death while traveling from his Fresno home to attend the second day of an off-site conference in Pismo Beach after having departed the conference the previous day to be home with his daughter who had just given birth was compensable under the

“commercial traveler” doctrine. (See *Skubitz v. Hanford Community Hosp.*, 2016 Cal. Wrk. Comp. P.D. LEXIS 168, pp. 18-20.)

Here, the record shows that defendant was in the business of preparing and serving meals to firefighters and forestry workers at remote locations. (Report, p. 2.) Defendant asked employees assigned to its Brownsville camp to volunteer to work at Happy Camp, a remote location without cellular telephone services where defendant was to serve meals for a three-to-six month period. Ex. 1, Statement of Jesse Rice, October 15, 2020, pp. 2-3.) Applicant and two other employees from the Brownsville camp agreed to travel to work at Happy Camp, and defendant authorized applicant to drive his own car from Brownsville to his residence and then to Happy Camp. (Partial Transcript of Proceedings, April 26, 2022, pp. 15:10-16:20.)

Although defendant authorized applicant to travel by his own car to Happy Camp, the record lacks evidence that defendant instructed him to refrain from using his car during off hours or for personal reasons.

Specifically, Jesse Rice testified that he did not recall having had any discussions with applicant about “not driving.” (*Id.*, pp. 11:9-22.) He testified that, in general, employees should not “be leaving . . . camp for . . . work-related business,” but did not suggest that defendant had placed any restriction or limitation on employees such as applicant in the use of their own cars during off hours or for personal reasons. (*Id.*, pp. 13:17-23.)

James Todd’s statement indicates that he had occasion to tell applicant that he should “leave after breakfast” so that he could travel home to Chico during daylight hours and later told applicant that he should have delayed his return to camp to ensure that he would not drive while tired and would avoid roads that were “dark and windy.” (Ex. 2, Statement of James Todd, undated, p. 2.) This statement suggests that defendant did not place applicant under any restriction or limitation in the use of his own car during off hours because it opines that applicant “would have [been] talked [] out of going” to Yreka had defendant been aware of his intention, not that he was barred from traveling there in the first instance. (*Id.*, p. 3.)

Kyle Brossard’s testimony also fails to suggest that defendant instructed applicant to refrain from using his own car during off hours or for personal reasons. He testified that he told applicant that defendant did not want employees leaving Happy Camp “if they don't have to” and “encouraged [employees] not to drive on the roads” for safety reasons. (*Id.*, pp. 23:9-11; 27:5-16.)

Brandon Duarte testified that he did not talk to anybody about driving to or from the camps. (*Id.*, p. 36:11-15.)

In addition, the documentary record shows that defendant did not attempt to restrict or limit its employees from driving for business reasons until after applicant's accident, when Mr. Rice prepared a statement that defendant "only wanted [employees] to drive . . . for essential business *moving forward*." (Ex. 1, Statement of Jesse Rice, October 15, 2020, pp. 2-3 [Emphasis added].)

On the day of the accident, applicant worked the breakfast shift and, afterwards, at about 9:00 a.m., commenced a seventy-mile drive to Yreka in his own car, texting manager Brossard later that he would return for his next shift at about 4:00 p.m., a timeframe permitting daytime travel in his off hours. (Partial Transcript of Proceedings, April 26, 2022, p. 19:1-19; Ex. 3, Statement of Kyle Brossard, October 6, 2020, p. 2.) Defendant was not informed of applicant's reasons for traveling to Yreka, but manager Todd surmised that it was to use his cellular telephone. (Ex. 2, Statement of James Todd, undated, pp. 2-3.)

Because defendant (1) allowed applicant to travel by his own car from the Brownsville camp to his Chico home and then return to continue his work there; (2) sought and obtained applicant's agreement to travel to Happy Camp on its business; (3) authorized applicant to travel to Happy Camp using his own car; and (4) did not instruct applicant to refrain from using his own car during his off hours or for personal reasons, applicant's conduct in using his own car during his off hours to drive from Happy Camp to Yreka was conduct reasonably expected by defendant to be incidental to its requirement that he spend time away from home.

Because the record presents no evidence as to applicant's reasons for traveling to Yreka other than manager Todd's surmise that it was to use his cellular telephone, and because applicant's travel occurred during his off hours between his morning and afternoon shifts, the record suggests that applicant's travel was for comfort or leisure and not a distinct departure from his employment.

Accordingly, we will substitute a finding that the evidence establishes that the commercial traveler rule applies to applicant's accident.

Having determined the merits of the Petition, we note that while the F&O does not include findings regarding the issues of the going and coming rule and intoxication, the record otherwise shows that the WCJ determined that these defenses are without support. (Opinion on Decision, August 11, 2022, pp. 3-4.) Accordingly, we will substitute findings that the evidence fails to establish that applicant's claim is barred by the going and coming rule and intoxication.

We also note that while the record unequivocally shows that applicant sustained a fracture to the right femur as a result of his October 5, 2020 motor vehicle accident, the F&O does not contain findings as to that issue or the issues of whether applicant sustained injury in the form of a traumatic brain injury or bruised lung. (Ex. D, Mercy Medical Center Records-Variou Dates, p. 59.) Accordingly, we will substitute findings that applicant sustained injury AOE/COE in the form of a fracture to the right femur and defer the issues of whether he sustained injury in the form of a traumatic brain injury and bruised lung, and we will return the matter to the trial level for further proceedings consistent with this decision.

Accordingly, we will rescind the F&O, substitute findings that the commercial traveler rule applies to applicant's accident, that applicant's claim is not barred by the going and coming rule and intoxication, that applicant sustained injury AOE/COE in the form of a fracture to the right femur, and that the issues of whether applicant sustained injury in the form of a traumatic brain injury and bruised lung are deferred, and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order, Opinion on Decision issued on August 11, 2022 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

#### **FINDINGS OF FACT**

1. The evidence establishes that the commercial traveler rule applies to applicant's accident of October 5, 2020.
2. The evidence fails to establish that applicant's claim is barred by the going and coming rule and intoxication.
3. The evidence establishes that applicant sustained injury AOE/COE in the form of a fracture to the right femur.
4. The issues of whether applicant sustained injury AOE/COE in the form of a traumatic brain injury and bruised lung are deferred.

**IT IS FURTHER ORDERED** that this matter is **RETURNED** for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**FEBRUARY 15, 2023**

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

**BRADEN NANEZ  
LAW OFFICES OF LARRY S. BUCKLEY  
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

**SRO/cs**

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

CS