

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

GABRIEL MORA (DECEASED), *Applicant*

vs.

CUSTOM FRESH CUTS, INC.; THE HARTFORD, *Defendants*

**Adjudication Number: ADJ11808374
Pomona District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Order of March 25, 2021, the workers' compensation administrative law judge ("WCJ") found that on February 9, 2017, the decedent, Gabriel Mora, was employed as a warehouse supervisor at Los Angeles, California, by Custom Fresh Cuts Incorporated, whose workers' compensation insurance carrier was The Hartford. The WCJ also found that the fact that Mr. Mora's killer, Eduardo Ortiz, had become an independent contractor after having been a full-time employee, was not a contributing cause of the shooting, that there was no outstanding loan from Mr. Mora to Mr. Ortiz because it was repaid by the new owner, Mr. Richard Wise, and that the loan was not a contributing cause of the shooting. In addition, the WCJ found that there was no evidence Mr. Ortiz was a disgruntled employee, that Mr. Mora had a close enough personal relationship to Mr. Ortiz to refer to Mr. Mora as his brother, that the claim of Mr. Mora's dependents for death benefits is barred by reason of the going and coming rule, and that the dependents did not meet their burden of proving that the nature of Mr. Mora's employment gave rise to the special risk exception of the going and coming rule.¹ In an uncontested finding, the WCJ also determined that the employer had knowledge of the injury to trigger the provision of the notice of potential eligibility to Mora's dependents, which was not provided, thereby tolling the Statute of Limitations and making the dependents' claim timely.

¹ This opinion will refer to Mr. Mora as "Mora" and to Mr. Ortiz as "Ortiz."

Mora's dependents ("petitioners") filed a timely petition for reconsideration of the WCJ's decision. Petitioners contend that Mora's death is excepted from the going and coming rule because he was within the zone of danger and his employment created a special risk. Petitioners further contend that the evidence does not justify the WCJ's conclusion that Mora had a close personal relationship with Ortiz, and that the WCJ erred in concluding that the cause of conflict between Mora and Ortiz was anything other than related to Mora's employment by Fresh Cuts. Finally, petitioners contend that the evidence does not justify the WCJ's findings that Ortiz's alleged disgruntlement, his independent contractor status, and the existence of a prior loan from Ortiz to Mora did not contribute to Mora's death.²

The Hartford filed an answer, which has been considered.

The WCJ submitted a Report and Recommendation ("Report").

Based on our review of the record and applicable law, we conclude the preponderance of evidence establishes that Mora's death arose out of and occurred in the course of employment. (Lab. Code, § 3202.5.) As our Decision After Reconsideration, we will rescind the WCJ's decision and substitute our finding that Mora's death is compensable, and we will return this matter to the WCJ for further proceedings to determine benefits.

BACKGROUND

The WCJ's Report provides a brief overview of the circumstances of Mora's death:

The decedent [Mora], a warehouse supervisor for Custom Fresh Cuts worked generally from 8:00 a.m. to 4:00 p.m. or 5:00 p.m. (MOH 12/15/20 pg. 12:3.5-5) He was shot on February 9, 2017. On the day of the shooting, there were approximately twenty vehicles parked along Bay Street. (App. Ex. 14, 1st Still Photo, Def. Ex. B Map) Surveillance video and still photos from the video show that the shooter, [Ortiz] backed his van into a parking stall on Bay Street adjacent to the purple gate that separated Bay Street from the employer's parking lot so that the driver's side was towards the employer's parking lot. (MOH 12/15/20, Pg. 7:9-18, App. Ex. 11 1st Still photo time of 17:31.41) [Mora's] white vehicle [backed out of] the employer's parking lot and backed completely into Bay Street. He stopped his vehicle with his driver's side door facing towards the

² Petitioners obtained transcripts of the two trial hearings in this matter. However, the Appeals Board is not obliged to review trial transcripts in order to test the accuracy and completeness of the Summary of Evidence, unless the petitioner points to specific, material defects in the Summary of Evidence. (*Allied Compensation Ins. Co. v. Ind. Accident Comm. (Lintz)* (1961) 57 Cal.2d 115 [26 Cal.Comp.Cases 241].) In their petition for reconsideration herein, petitioners do not point out any such defects. Therefore, we need not review the trial transcripts. We find it sufficient to review and rely upon the Summaries of Evidence.

driver's side of the shooter's van. (App. Ex. 11 1st Still photo time of 17:31.41, MOH/SOE pg. 8:23-25, Segment 3 Camera 14) The decedent was shot by Mr. Ortiz at 5:32 p.m. (App Ex. 14, 3rd photo, MOH 12/15/20 pg. 8:25-9.5). After the shooting [Mora] continued driving up Bay Street eventually succumbing to his injuries at the nearby intersection of Bay and Mateo Street. (MOH pg.8:10-10.5, App. Ex. 1 Death Certificate) [Mora] was not conducting duties for the employer at the time the shooting occurred. (Def Ex. A denial letters 2/14/19 and 2/15/19)[³]

[Mora] started the company Custom Fresh Cuts in February 2015. In June 2015 [Mora] had Mr. Richard Wise assume ownership of the company. In exchange, Mr. Wise assumed all debts including a \$14,000.00 loan that [Mora] had from [Ortiz]. This loan was paid off in April or May of 2016. Prior to the shooting, [Mora] had introduced [Ortiz] as his brother to Richard Wise in 2015. After Mr. Wise took ownership of the company, [Ortiz] continued to do work as an independent contractor for the company until 2016 for which he was paid. [Ortiz] continued to go to Custom Fresh Cuts 2-3 times per week and as recent as one week prior to the shooting.

The applicant, Ms. Maria Perez, [Mora's] live-in [girlfriend had her] rear car windows...broken the same week as [Mora's] death (MOH 3/1/21 Ms. Perez testimony pg. 3:19-22) and also the week of 7/22/17 but nothing was taken. Police believed the broken windows were related to [Mora's] murder.[⁴] Ms. Perez relocated and transferred her kids to a new school. (Def Ex. "E" Except from Transforming Life Center pg.11/31)

DISCUSSION

I. MORA'S DEATH AROSE OUT OF EMPLOYMENT

The general principles relevant to the inquiry whether an injury or death arises out of and occurs within the course of employment ("AOE/COE") are well-settled. In *Guerra v. Workers'*

³ The WCJ's statement that Mora was not conducting duties for the employer at the time of the shooting is not a statement of fact. The statement is an *assertion* made in defendant's claim-denial letters found within defense Exhibit A, which refers to no *evidence* to establish the *assertion* as a fact.

⁴ The WCJ's statement that the police believed the broken windows in Ms. Perez's car were related to Mora's murder is speculation. No police reports are in evidence. Otherwise, Exhibit E (pp. 11-31) includes a "Transforming Life Center" therapy record noting that Ms. Perez "shared" with her therapist that "law enforcement is taking [the broken windows] as part of [Mora's murder]" because "nothing was taken and...it was the back windows." We take the therapy record as speculation not least because it is based on doubtful hearsay - the therapist said that Ms. Perez said that the police indicated the broken windows were related to Mora's murder.

Comp. Appeals Bd. (2016) 246 Cal.App.4th 1301, 1307-1308 [81 Cal.Comp.Cases 324] (“*Guerra*”), the Court of Appeal provided a helpful overview:

The statutory requirement that the injury must have occurred “in the course of the employment” ordinarily refers to the time, place and circumstances under which the injury is sustained. (See *Griffin v. Industrial Acc. Com.* (1937) 19 Cal.App.2d 727, 732–733 [66 P.2d 176]; 1 Hanna, Cal. Law of Employee Injuries and Workers’ Compensation (rev. 2d ed.) § 4.03, p. 4-36 (rel. 73-4/2011).) [In the *Guerra* case, there was] no question that [the injured employee’s] death occurred while he was at work during work hours while wheeling an overflowing trash can on a dolly to the dumpster.

The term “arise out of the employment” means that the injury must be proximately caused by the employment. (1 Hanna, Cal. Law of Employee Injuries and Workers’ Compensation, supra, § 4.02[2], p. 4-16 (rel. 67-4/2008).) “‘If the disability, although arising from a [preexisting nonindustrial condition], was brought on by any strain or excitement incident to the employment, the industrial liability still exists. [...] .’” (*California etc. Exchange v. Ind. Acc. Com.* (1946) 76 Cal.App.2d 836, 840 [174 P.2d 680].)

Further, “when a third party intentionally injures the employee and there is some personal motivation or grievance, there has to be some work connection to establish compensability.”⁵ (*Atascadero Unified School Dist. v. Workers’ Comp. Appeals Bd. (Garedes)* (2002) 98 Cal.App.4th 880, 884 (67 Cal.Comp.Cases 519) [claimed psychiatric injury from co-workers’ gossip about applicant’s personal life did not arise out of employment].)

If such a connection is shown, however, the burden shifts to the employer to prove a personal motive for the injury. (*Ephraim v. Certified Sandblasting Co.* (1968) 33 Cal.Comp.Cases 599 (Appeals Board en banc) [claim of unintended victim who survived workplace shooting by unidentified assailant found compensable, but if victim had died, burden would have shifted to defendant to prove personal motive for shooting]; *Lee v. Workers’ Comp. Appeals Bd. (Rincon)* (2012) 77 Cal.Comp.Cases 297 (writ den.) [liquor store clerk, shot and killed by unknown assailant in store, arose out of employment]; *Jethro Cash & Carry v. Workers’ Comp. Appeals Bd.* (2008) 73 Cal.Comp.Cases 698 (writ den.) [laborer found shot to death by unknown assailant in employer’s locker room, arose out of employment].)

⁵ String citations omitted.

In this case, the WCJ concluded that petitioners “did not meet the burden of proof that the shooting had a connection to the employment.” (Opinion on Decision, p. 4.) However, the only factors considered by the WCJ in reaching this conclusion are that though Ortiz loaned money to Mora in 2015 to start the business at which they both worked, Mr. Wise assumed all debts and paid off the loan in question, and there was a gap of some nine or ten months between the time Wise took over the business in April or May 2016 and the time of the shooting.⁶ The WCJ reasoned that since the loan had been paid off and Ortiz had waited months to kill Mora, petitioners failed to show that Ortiz’s loan to Mora was a “contributory cause” of the shooting. (Opinion on Decision, p. 5.)

We disagree. As noted above, the law only requires petitioners to show “some work connection” between Mora’s employment and his shooting death at the hands of Ortiz. In our view, this burden of proof does not require petitioners to prove that a specific issue – such as the loan from Ortiz to Mora – directly caused Mora’s death. Similarly, petitioners were not required to prove that Ortiz was a “disgruntled” co-worker, as discussed in the WCJ’s Opinion on Decision and Report.

Moreover, we take a different reading of the record than the WCJ. We are persuaded that the evidence supports a strong and reasonable inference that Ortiz’s shooting of Mora was connected to Mora’s employment by Mr. Wise.⁷ Ortiz had loaned money to Mora to fund a business started by Mora, who then transferred the business to Mr. Wise, with Mora retained as a managing employee and Ortiz retained as an independent contractor. In our view, these circumstances and the relationship between the three men (further discussed below) easily establish that Ortiz’s shooting of Mora must have been connected to Mora’s continued employment by Mr. Wise - even though the exact nature of the connection will never be fully known.

⁶ The WCJ also considered that the shooting may have been “work-connected” because Mora was leaving work when he encountered Ortiz, which gave Ortiz the opportunity to kill him. Although the issues of “AOE” and “COE” are closely related, it appears that Mora’s location when Ortiz shot him is more germane to the issue of “COE,” i.e., the “time and place” of Mora’s death.

⁷ Petitioners need not “show that an inference in [their] favor is the only one that may be reasonably drawn from the evidence; [they] need only show that the material fact to be proved may logically and reasonably be inferred from the circumstantial evidence. [...] The mere fact that other [adverse] inferences...might be drawn does not render the [favorable] inference too conjectural or speculative for consideration [by the trier-of-fact].” (See *Guerra v. Workers’ Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, 1309 [81 Cal.Comp.Cases 324], quoting *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 121, internal citations and internal quotation marks omitted.)