

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Case No. ADJ10774888

Applicant,

vs.

**PERMISSIBLY SELF-INSURED,
ADMINISTERED BY**

Defendants.

**FINDINGS AND AWARD
AND OPINION ON DECISION**

The above-entitled matter having been heard and regularly submitted, Therese Da Silva, Workers' Compensation Judge, now makes her decision as follows:

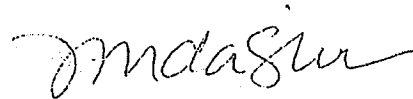
FINDING OF FACT

1. while employed on November 8, 2016, in California, as a teacher, occupational group 214, by sustained an injury to her neck, left shoulder and humerus bone but compensation is barred by the "going and coming" rule.

ORDER

IT IS ORDERED THAT applicant take nothing.

DATE: 08/29/2017



Therese Da Silva
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

Applicant is an itinerant music teacher for

Technically, she has two jobs: she is an instrumental teacher for offering instruction on an impressive array of wind and string instruments, and she is a general music teacher. Applicant works four days per week at three different and the combination of jobs and class schedule make her equivalent of 0.8 of a full time teacher. (Minutes of Hearing/Summary of Evidence July 24, 2017, "MOH/SOE," at page 5: lines 2-4.) At the time of her injury, her regular workweek was comprised of seven classes per day, Tuesday through Friday, with Monday being her day off. Exhibit B is applicant's "Hourly Class Instruction Schedule" at the time of her injury. On Tuesdays, she was assigned to school for her entire workday. On Wednesdays, applicant worked at On Thursdays, she was assigned to from 8:50 a.m. through 11:10 a.m. and then she worked at from 1:30 p.m. to 3:20 p.m. On Fridays, she worked her entire day at

Applicant does not own a car. She travels to work on her bicycle. As stipulated by the parties, on November 8, 2016, applicant was on her bicycle on the way to work at when she was struck by an automobile. She sustained various injuries as the result of the collision, including injury to her neck, left shoulder, and humerus bone. The claim is denied under the "going and coming" rule. The "going and coming" rule renders noncompensable injuries occurring during a regular commute to a fixed place of business at fixed hours in the absence of special or extraordinary circumstances. Work done at home may exempt an injury occurring during a regular commute from the "going and coming" rule if circumstances of employment, and not mere dictates of convenience to an employee, make a home a second jobsite.

As with all school teaching jobs, a lesson plan is required for each period. (*See* Exhibit B.) Preparation time is not scheduled by in this case, but it is a necessary component of applicant's job. Applicant's uncontroverted testimony was that require more detailed preparation as they have less attention span. (MOH/SOE, 6:6-8.) At trial, applicant testified to her usual routine. After the school day is over and while she is still on site, applicant will gather and sort her materials, record what she has done for the day, and may occasionally use the school phone (MOH/SOE, 6:15-22.) She does the remainder of her prep

work at her home office where she has “considerable and voluminous” resources for each grade level, along with instruments, books, papers, repair kits, and props. (Exhibit 1; MOH/SOE, 6:24-33; 6:39-7:5.) She starts her preparation after dinner, around 8:00 p.m., and then in morning before school, she will check her email. (MOH/SOE 6:35-37.) None of the schools, except for has any storage available for her instruments or supplies. (MOH/SOE 8:16-19.) For each workday, she must pack saddlebags for her bicycle with props, instruments, charts, and supplies. Likewise, other itinerant music instructions store and transport materials in their personal vehicles. (MOH/SOE, 7:17-27.)

In *Wilson v. Workers' Comp. Appeals Bd.* 127 Cal. Rptr. 313, 41 Cal.Comp.Cases 76 (1976), the employee was a teacher for the Oakland Unified School District who was involved in a car accident on the way to school. At the time of the accident, her car contained a bag of supplies for art class, materials graded at home the previous evening, and a few books, including her teaching manual. The class schedule did not include a specific period for planning lessons or grading papers. Teachers could complete class preparation at school, but usually chose to work at home for their own convenience. The school library contained some curriculum resources, which “urged teachers to enliven lectures and awaken pupil imagination with home-gathered sketches, charts, maps and other demonstration material.” The California Supreme Court affirmed the Board’s holding that work performed by Wilson at home was for the employee’s convenience and warranted no exception to the “going and coming” rule.

In *Santa Rosa Junior College v. Workers' Comp. Appeals Bd. (Smyth)* (1985) 50 Cal.Comp.Cases 626, a college instructor was killed driving home from work. Mr. Smyth was a mathematics instructor and head of the mathematics department. He lived 60 miles from campus and had a home office, with a space dedicated to textbooks and materials. Likewise, many other instructors worked from home and, at trial, other instructors testified that it was difficult to work on campus due to constant interruptions familiar to a school campus. The administration neither encouraged nor discouraged working at home. Relying on *Wilson*, the California Supreme Court held that unless the employer *requires* the employee work at home as a condition of employment, the fact that an employee works at home does not transform the home into a second worksite. The court stated “a home does not become a second job site simply because one’s employment requires long working hours and the employer knows that the employee frequently brings work home.” Likewise, in *Harmon v. Workers' Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 234 (writ denied) a teacher was denied compensation for injuries sustained in an automobile accident while on his

way home from work. He was assigned to teach in three different classrooms without a desk of his own, and as a result, it was more efficient to work at home. However, no exception to the "going and coming" rule was found.


Working at home, though practical and more efficient for applicant, is not a condition of her employment. Applicant testified that she was neither required nor instructed to work at home. (MOH/SOE, 9:19-24.) She acknowledged that the three schools have teachers' lounges where she could have performed work, though it would have been inconvenient for her to do so. (Id., 9:16-18.) In addition, [redacted] has no control over how and when applicant chooses to prepare for her classes: she chooses to work late in the day, after dinnertime, and also checks her email in the early morning. [redacted] would not necessarily know nor expect that a teacher would be working after 8:00 p.m. or that she would do any work before the school day begins. Finally, there is no evidence that applicant is paid for performing work at home: her pay is based on her scheduled workload of classes, which amounts to 80% of a full time position.

As set forth in *Wilson*:

"[t]he contemporary professional frequently takes work home. There, the draftsman designs on a napkin, the businessman plans at breakfast, the lawyer labors in the evening. But this hearthside activity—while commendable—does not create a white collar exception to the going and coming rule."


Wilson, supra, 127 Cal. Rptr., p. 315. Therefore, based on case law, applicant's unfortunate accident, which occurred on her way to work, is not compensable.

DATE: 08/29/2017


Therese Da Silva
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

SERVICE ON PARTIES LISTED ABOVE:

ON: August 29, 2017 BY:  Kelly V WCAB-OAK