WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ERIKA SPENCE, *Applicant*

vs.

CITY OF LOS ANGELES, permissibly self-insured, *Defendant*

Adjudication Number: ADJ10987859
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the July 16, 2018 Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant, while employed by defendant City of Los Angeles as a police officer on July 30, 2017, sustained industrial injury to her right foot.

Defendant, citing Labor Code section 3600(a)(9),[1] contends that the evidence does not support a finding of compensable industrial injury arguing that at the time applicant was injured she was voluntarily participating in an off-duty recreational or athletic activity that was neither a reasonable expectancy of her employment as a police officer nor expressly or impliedly required by her employment.

Applicant did not file an answer. We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ in response to defendant's Petition for Reconsideration (Petition), which recommended that the Petition be denied.

We have reviewed the record and have considered the allegations of the Petition for Reconsideration and the contents of the WCJ's Report. For the reasons set forth herein, we will rescind the July 16, 2018 F&O, and substitute it with a new F&O finding that applicant's claim is barred by section 3600(a)(9).

---

[1] Further statutory references are to the Labor Code.

FACTS

Applicant filed an application for adjudication of claim alleging that on July 30, 2017 she sustained industrial injury to her right foot while playing in a basketball tournament with other women from the Los Angeles Police Department (LAPD) called the Menehune Basketball Invitational Tournament held at a facility in the City of La Puente, California and hosted by a private organization. (Exhibit l; Summary of Evidence (MOH/SOE) June 5, 2018, page 4:23-5:1).

On June 5, 2018 the matter proceeded to trial on the sole issue of injury arising out of employment and in the course of employment (AOE/COE.).

The June 5, 2018 Minutes of Hearing and Summary of Evidence (MOH/SOE) summarize applicant's testimony in part as follows:

> No one encouraged or pressured Ms. Spence to play on the women's basketball team. There would not be any negative consequences if Ms. Spence did not join the team, nor would there be any promotions or benefits if she did join. Her participation on the team was voluntary. Participating in tournaments was also voluntary
>
> (Minutes of Hearing/Summary of the Evidence dated June 5, 2018 (MOH/SOE), p. 6:19-21 Transcript of Proceedings, dated June 5, 2018(Transcript), pp. 21:18-23:2.)

Defendant presented the testimony of Sergeant Edward Acosta along with an excerpt of the 2017 LAPD Manual Vol. 3 (Joint Exhibit 5), in which Sergeant Acosta testified that, while basketball is on a list of approved activities, the tournament in which applicant was injured did not meet the requirements outlined in the LAPD Manual. (MOH/SOE, pp. 9:12- 11:6; see also, Transcript, p. 56:22-15.)

On July 16, 2018 the WCJ issued the F&O finding that the applicant's injury occurred AOE/COE.

Defendant seeks reconsideration of this F&O.

DISCUSSION

We acknowledge that more than 60 days elapsed from the date the Petition for Reconsideration was filed on August 8, 2018 and the date we issued our Opinion and Order Granting Petition for Reconsideration on December 10, 2018. Section 5909 provides that a

petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice . . . . ." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of section 5909. The Appeals Board did not act on defendant's Petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.*) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Id.*) Therefore, considering that the Appeals Board's failure to act on the petition was in error, we find that our time to act on defendant's Petition for Reconsideration was tolled.

We now turn to the merits. Generally, to be compensable, an injury must have been AOE/COE. The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297298, 302; §§ 3600(a); 3202.5.) Section 3600(a)(9) bars compensation for an injury

> Where the injury does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. The administrative director shall promulgate reasonable rules and regulations requiring employers to post and keep posted in a conspicuous place or places a notice advising employees of the provisions of this subdivision. Failure of the employer to post the notice shall not constitute an expression of intent to waive the provisions of this subdivision.

(Lab. Code, § § 3600(a)(9).)

Evaluation of whether an injury is barred under section 3600(a)(9) requires a two-prong test:

> (1) [W]hether the employee subjectively believes his or her participation in an activity is expected by the employer, and (2) whether that belief is objectively reasonable.
>
> (*Ezzy v. Workers' Comp. Appeals Bd.* (1983) 146 Cal.App.3d 252, 260 [48 Cal.Comp.Cases 611].)

Under this two-pronged *Ezzy* test, the issue of subjective belief is a question of fact, which we review under the substantial evidence rule; and the issue of objective reasonableness is a question of law. (*Young v. Workers' Comp. Appeals Bd.* (2014) 227 Cal.App.4th 472, 477; *citing, City of Stockton* (2006) 135 Cal.App.4th 1513, 1524.)

In this case, based on applicant's testimony, the first prong of *Ezzy* was not met. That is, applicant did not establish that she subjectively believed that participation in the Menehune Basketball Invitational Tournament was required.

> It was not a requirement of her employment to play basketball. She joined the team when her friend Tracy Wolfe asked her to try out. Tracy Wolfe is not her supervisor. No one encouraged or pressured Ms. Spence to play on the women's basketball team. There would not be any negative consequences if Ms. Spence did not join the team, nor would there be any promotions or benefits if she did join. Her participation on the team was voluntary. Participating in tournaments was also voluntary.
>
> (Minutes of Hearing/Summary of the Evidence dated June 5, 2018 (MOH/SOE), p. 6:17-21; see also, Transcript, pp. 21:18-23:2.)

Applicant did not testify that she believed the activities satisfied any requirements of her employment. Thus, the first prong of the *Ezzy* analysis was not satisfied. Therefore, we need not address the second prong, i.e., whether the belief was objectively reasonable

Additionally, we note that "departments have the ability to limit the scope of potential liability by designating and/or preapproving athletic activities or fitness regimens []. (*Young v. Workers' Comp. Appeals Bd*. (2014) 227 Cal.App.4th 472, 482; *citing, Taylor v. Workers' Comp. Appeals Bd*. (1988) 199 Cal.App.3d 211.) (*Taylor*)".)

> Where a police officer was injured at a city-owned gymnasium while playing in a pickup game of basketball during his lunch break. The police department expected officers to keep in good physical condition; however, the department provided no formal fitness training sessions or guidelines, and there were no formal physical fitness tests. The police department also issued a general order, which included a provision that workers' compensation benefits would not be awarded for athletic injuries unless approval for an athletic event or exercise had been obtained in advance. The Court of Appeal, First Appellate District, Division Two, found the injury not compensable, as participation in the pickup game was voluntary and it was not reasonably expected or required by the officer's employment. The court added that it is reasonable to permit an employer to limit its liability for athletic injuries, as had the department, because "[t]o hold otherwise would in effect render the employer potentially liable for any injury sustained in any recreational or athletic activity if the activity contributed to the employee's physical fitness. Such broad potential liability would be contrary to the legislative intent of section 3600, subdivision (a)(9).
>
> *Young v. Workers' Comp. Appeals Bd.* (2014) 227 Cal.App.4th 472, 479 [*internal citations omitted*].

In this case, the LAPD Manual specifically outlined the conditions under which injury resulting from athletic activity will be considered on duty:

> 772. DEPARTMENT ATHLETIC ACTIVITY.
> Injury resulting from athletic activity will be considered as injured on-duty, providing:
> It was sustained while participating in an approved activity at an approved location;
> The injured employee had signed an athletic activity report prior to actual participation;
> The employee complied with all conditions established by the Commanding Officer, Training Division; and,
> The injured employee was examined by a contract hospital doctor or a Central Receiving Clinic doctor.
>
> (Joint Exhibit 5). LAPD Manual, Volume 3, Section 772

These requirements appear to be reasonable limits upon the kinds of activities covered by the employer. Defendant presented the testimony of Sergeant Edward Acosta who testified that LAPD Manual, Volume 3, Section 772 provides that an injury must be: (1) sustained during a sanctioned athletic activity or event, (2) at an approved location, and (3) the employee must have signed an athletic activity register form (LAPD Form 24 13.14.00) prior to participation. (Joint

Exhibit 5; MOH/SOE, pp. 9-10, testimony of Edward Acosta).

Defendant further submitted evidence that the facility at 16101 Old Valley Blvd. in La Puente was not an approved location, and further that the tournament was not an approved activity. (MOH/SOE, pp 10- 11:3-5). Applicant did not rebut this evidence and testified that she was unfamiliar with these policies. (MOH/SOE p. 8: 13-15). Although Sergeant Acosta did testify that the women's basketball team was an approved activity, defendant also showed that the approval is limited to the provisions of section 772 of Volume 3 of the 2017 LAPD manual. Moreover, applicant failed to rebut defendant's evidence that the tournament in which applicant was reportedly injured, was not included in the defendant's approved activities. Thus, based on this record, we find that applicant failed to establish that any injury sustained in this activity was "on duty" pursuant to the provisions of the LAPD Manual.

In summary, applicant has failed to establish the first prong of the analysis provided by *Ezzy (supra,* at 260) because applicant testified that she did not subjectively believe that participation in the Menehune Basketball Invitational Tournament was required. In addition, applicant has failed to establish that the injury was an approved activity pursuant to the provisions of the LAPD manual. For these reasons, applicant's claim is not compensable.

Accordingly, as our decision after reconsideration, we will rescind the July 16, 2018 Findings of Fact and Order and substitute a new decision finding that applicant's injury did not occur AOE/COE.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 16, 2018 Findings of Fact and Order is **RESCINDED** and the following **SUBSTITUTED** therefor:

FINDING OF FACT

1. Erika Spence, while employed July 30, 2017, as a police officer, Occupational Group Number 490, at Los Angeles, California, by the City of Los Angeles, permissibly self-insured, did not sustain injury arising out of and in the course of employment to her right foot.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 6, 2021

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

ERIKA SPENCE
CITY OF LOS ANGELES
STRAUSSNER SHERMAN

LN/oo

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