WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOEL RUIZ, *Applicant*

vs.

CITY OF LOS ANGELES, Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ13624079
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of an arbitrator's Findings and Order of August 23, 2023, wherein it was found that applicant's claim was barred by the provisions of Labor Code section 3600(a)(9), which bars recovery for injuries which "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." Applicant was a police officer who was injured during a kickboxing class at a private gym while off-duty.

Applicant contends that the arbitrator erred in finding his claim non-compensable. We have received an Answer from defendant, and the arbitrator has filed a Report and Recommendation on Petition for Reconsideration (Report). We have also considered a supplemental pleading despite the fact that applicant did not seek leave to file the supplemental petition nor set forth good cause for doing so, as required by Appeals Board Rule 10964(b) (Cal. Code Regs., tit. 8, § 10964, subd. (b).) Applicant is reminded to follow Appeals Board rules and procedures in future Appeals Board proceedings.

We will deny applicant's Petition for the reasons stated below and by the Arbitrator in the Report which we adopt, incorporate, and quote below.

Preliminarily, we note that both the arbitrator's Report and the defendant's Answer raise the issue of the timeliness of applicant's Petition. While the proof of service attached to the Petition does not reflect service on the arbitrator, as required by Appeals Board Rule 10990(c)(5) (Cal. Code Regs., tit. 8, § 10990, subd. (c)(5)), and the arbitrator states that he received the Petition

late, the Petition was timely filed with the Appeals Board. Although the arbitrator received the petition after the statutory period, it is not clear whether it was served within the statutory period. In any case, since the case was timely filed with the Appeals Board, we will accept the Petition as timely. Applicant is again reminded to follow Appeals Board rules and procedures in future Appeals Board proceedings.

Turning to the merits, we will deny for the following reasons and for the reasons stated in the arbitrator's Report quoted below. In the seminal case of *Ezzy v. Workers' Comp. Appeals Bd.* (1983) 146 Cal.App.3d 252 [48 Cal.Comp.Cases 611], the court fashioned a two-part test to determine whether off-duty recreational, social, or athletic activity is compensable. According to the *Ezzy* test, "the test of 'reasonable expectancy of employment'… consists of two elements: (1) whether 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*, 146 Cal.App.3d at p. 260.) The first part of the *Ezzy* test has been labeled a "lax standard" (*Wilson v. Workers' Comp. Appeals Bd.* (1987) 196 Cal.App.3d 902, 906 [52 Cal.Comp.Cases 369]), and thus most cases are decided on the second strand of the *Ezzy* test: whether the employee's belief that an activity is expected is objectively reasonable.

Since *Ezzy* was issued, a number of Court of Appeal decisions have applied section 3600(a)(9) and the *Ezzy* test in the context of a peace officer injured during off-duty athletic activity. (See *Wilson v. Workers' Comp. Appeals Bd.* (1987) 196 Cal.App.3d 902 [52 Cal.Comp.Cases 369]; *Taylor v. Workers' Comp. Appeals Bd.* (1988) 199 Cal.App.3d 211 [53 Cal.Comp.Cases 115]; *Kidwell v. Workers' Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1130 [60 Cal.Comp.Cases 296]; *City of Stockton v. Workers' Comp. Appeals Bd. (Jenneiahn)* (2006) 135 Cal.App.4th 1513 [71 Cal.Comp.Cases 5]; *Tomlin v. Workers' Comp. Appeals Bd.* (2008) 162 Cal.App.4th 1423 [76 Cal.Comp.Cases 672]; *Young v. Workers' Comp. Appeals Bd.* (2014) 227 Cal.App.4th 472 [79 Cal.Comp.Cases 751.)

In *Jenneiahn, supra*, the Court of Appeal surveyed the prior cases applying the *Ezzy* rule and concluded that "The decisions that have allowed workers' compensation pursuant to subdivision (a)(9) have generally found the employer expected the employee to participate in the specific activity in which the employee was engaged at the time of injury." (*Jenneiahn*, 135 Cal.App.4th at p. 1524.) In *Wilson, supra*, for instance, the Court of Appeal found compensable an injury sustained by a police officer while running to train for a fitness test to remain part of his

department's special emergency reaction team (SERT). SERT members had to pass four fitness tests per year, including one that required members over 35 to run 2 miles in 17 minutes or less.

Similarly, in *Kidwell*, the court found compensable an injury sustained by a highway patrol officer while performing a standing long jump at home. The officer in *Kidwell* was training for a mandatory physical performance program fitness test, which required the test taker to perform a standing long jump with a minimum clearance of 68 inches. In *Tomlin*, which was decided after *Jenneiahn*, a police officer, who was a member of the SWAT team, was injured running while training for a required annual examination which included running.

Thus, in most of the cases where the injury was found compensable, the injured worker was training for a fitness test, and was performing the specific physical activity he or she was to be tested on. In *Jenneiahn*, in contrast, the police officer applicant was injured while playing basketball to maintain his general fitness for duty, rather than training for any specific required test. The *Jenneiahn* court flatly held that "[t]he general, and reasonable expectation that a police officer will maintain sufficient physical fitness to perform his or her duties is not a sufficient basis to extend workers' compensation coverage to any and all off-duty recreational or athletic activities in which an officer voluntarily choses to participate." (*Jenneiahn*, 135 Cal.App.4th at p. 1526.)

In *Young, supra*, which was also decided after *Jenneiahn*, a correctional sergeant was injured while performing jumping jacks as part of a general fitness regimen. However, in *Young*, unlike the case at bar, there was a written departmental order requiring officers to maintain themselves in good physical condition. (*Young*, 227 Cal.App.4th at p. 475.) Additionally, contrary to here where applicant said that there was no physical training requirement, in *Young*, officers "were required to undergo periodic training exercises, many of which involved physical activity." (*Ibid*.) Finally, the *Young* decision states, "To allay any concerns law enforcement departments may have about potentially increased liability as a result of this decision, we note that departments have the ability to limit the scope of potential liability by designating and/or preapproving athletic activities or fitness regimens…." (*Id.* at p. 482.) It appears that is exactly what defendant did in this case in the Department Manual, which lists only specified activities as being approved, with those activities only approved at specified locations.

We otherwise deny for the following reasons stated in the arbitrator's Report quoted below, much of which aligns with our views above. As noted, we do not incorporate the arbitrator's discussion of the timeliness of the Petition.

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

1. **Applicants Occupation:** Police Officer

2. **Applicant's age at dates of injury:** 48

3. **Dates of injury:** July 11, 2020

4. **Parts of body injured:** Left ankle, lower extremity

5. **Identity of petitioner:** Applicant

6. **Timeliness:** No

7. **Verified:** Yes

8. **Answer Filed:** Yes

9. **Date of Action:** August 23, 2023

10. **The petitioner's contentions:** The claim is not barred by Labor Code Section 3600(a)(9) as off-duty athletic activity.

II. FACTS

Applicant filed a claim for an injury to his ankle. He sustained an injury while participating in an off-duty kickboxing class at a private gym in a city unaffiliated with the Los Angeles Police Department. The Defendant only became aware of this activity on receipt of the claim. Defendant denied the claim on the basis of Labor Code Section 3600(a)(9) as an off-duty athletic unapproved activity by the department.

After hearing and reviewing the testimonial and documentary evidence presented by the parties at the arbitration the undersigned found that the claim is barred by Labor Code Section 3600(a)(9) as it failed to meet the second prong of the Ezzy vs. WCAB (1983)48ccc611 standard. Applicant's subjective belief that his voluntary off-duty kickboxing activity was a requirement of his employment with the Los Angeles Police Department was found not to be objectively reasonable.

III.
DISCUSSION

Applicant's Petition for Reconsideration states that he was on duty when he was injured but his testimony at the arbitration on June 28, 2023, pg. 25 lines 1-12 states that he was in an on-call status. When that occurs, he is not engaged in law enforcement activities if he isn't called in by a supervisor, which he was not. Further his supervisors do not provide any instructions as to what activities he may or may not participate in while in this status. He was not on duty.

Applicant next argues that he was instructed verbally by Academy instructors twenty years ago to conduct off-duty training and encouraged and told to seek training outside of the department as they only taught basic self defense courses at the Academy. In addition, it is argued that his unrebutted testimony establishes that officers are still expressly instructed to perform their own off-duty training, and that to this day Academy instructors are still telling recruits to go and seek outside training on their own.

Applicant's unrebutted testimony is based entirely upon self-serving, uncorroborated, multiple hearsay verbal statements from unidentified training officers twenty years ago as well as multiple hearsay statements from a former partner.

I found Applicant's testimony credible as to his subjective belief that he was encouraged to maintain physical fitness training on his own if he so desired. I did not find that the multiple self-serving hearsay statements aforementioned were substantial evidence or objectively reasonable to prove that he was told he was required to perform outside training on his own in light of the entire testimonial and documentary evidence submitted.

In support of this finding the following designated portions of Applicant's testimony from the arbitration transcript of June 28, 2023 are as follows:

- Pg. 46 lines 12-15 there was no formal policy through the Academy once he graduated that he was required to take outside training.

- Pg. 28 lines 11-25 there were no physical fitness standards or requirements that were imposed on him nor any physical agility tests. There is encouragement to participate in a physical fitness regimen.

- Pg. 21 lines 17-21 the Los Angeles Police Department manual encourages officers to engage in some sort of physical fitness program to stay healthy.

- Pg. 28 lines 23-25 there is no requirement or policy that requires a certain level of physical fitness.

- Pg. 33 lines 1-11 there was nothing in his job description at any time that required him to perform outside training or kickboxing.

- Pg. 30 line 10 – Pg. 31 line 6 he was never offered any incentives or threatened with any reprimands or disciplined if he did not take an outside training course. He was also unaware of any officer being taken off the job for not taking an outside training course.

- Pg. 35 line – Pg. 36 line 25 he was not required to know any techniques or tactics to perform his job except those that he was taught at the Academy.

- Pg. 47 line 22 – Pg. 48 line 1 the Los Angeles Police Department provides some gym locations and equipment either at the Academy or various stations where officers can engage in a physical fitness regimen.

- Pg. 42 line 24 – Pg. 43 line 2 he has received other training orders from the department.

DOCUMENTARY EVIDENCE:

The Los Angeles Police Department manual (exhibit B) delineates certain injuries sustained during athletic activities are deemed to arise out of and in the course of employment subject to specific requirements and kickboxing is not one of them. The manual does allow self-defense courses if taken under the supervision of a training officer if requested and authorized. Applicant did not request the kickboxing class and it was not taken under the supervision of a training officer. If additional training is deemed necessary, the department can issue a performance order which they did not do for this activity.

Based upon the foregoing, it was found that the testimonial and documentary evidence was more credible than the multiple self-serving hearsay statements from unidentified, uncorroborated individuals.

CASE LAW CITED BY APPLICANT:

Applicant argues that numerous Court of Appeals cases uphold A.O.E. / C.O.E. coverage for physical fitness and training. The case law he cites does not support his arguments. In Young v. W.C.A.B. (2014) 79ccc751 the department required its correctional officers to undergo periodic training exercises, many of which required physical activity. The court found that the jumping jacks he was performing at home when injured were objectively reasonable for him to believe the department expected him to perform in order to maintain sufficient cardiovascular health to pass the training exercises not because he needed to stay in good physical shape generally. In fact, the case states why the Los Angeles Police Department manual deserves great weight. The court further stated that

law enforcement departments could limit the scope of potential liability by designating or pre-approving athletic activities of fitness regimens.

Similarly in Kidwell v. W.C.A.B. (1995) 33Cal.App4th off-duty long jump deemed A.O.E. / C.O.E. because a standing long jump was part of her annual fitness test and there was no evidence the employer offered its employees practice facilities, supervision, or on-duty time to practice. It also found failure to pass would adversely affect her salary, opportunity for promotion, and ability to participate in special programs.

In Wilson v. W.C.A.B. (1987) 52ccc369 an off-duty police officer injury while exercising was found A.O.E. / C.O.E. because the officer's exercising was in order to pass tests required by the city to remain a member of a special tactical unit and that off-duty exercise was necessary to qualify for the test.

In Tomlin v. W.C.A.B. (2008) 73ccc593 the court found that an off-duty SWAT officer's injury while jogging in preparation for a physical fitness exam was A.O.E. / C.O.E. despite the fact that the injury occurred while he was on vacation.

The case law clearly demonstrates that the activity undertaken in the cases cited by Applicant were all directly related to a physical fitness test that was required by the employer. Applicant's argument that his being in good physical shape to help him to de-escalate altercations involves techniques and methods which has already been shown to be irrelevant other than what he was taught at the Academy. Further the purpose of de-escalation in a physical altercation is to only use a reasonable amount of force appropriate to the specific circumstance. De-escalation policy applies to all police officers and requires judgement as to the amount of force used in a specific circumstance and not any specific tactic or technique utilized. It is a general policy which cannot be objectively measured except in a specific circumstance. Kickboxing is capable of escalating as well as de-escalating an altercation.

The case law in Taylor v. Workers-Comp.appealsbd (1988) 199Cal.App.3rd211 and in City of Stockton v. W.C.A.B. (Jennieiahn) (2006) 71ccc5 clearly shows that a substantial nexus between an employer's expectations and a specific off-duty activity in which the employee engaged is required otherwise the scope of coverage becomes virtually limitless and contrary to the legislative intent subdivision (a) (9). That sufficient nexus was found to be lacking in this case. These cases also rejected the benefit to the employer and an employers expectations that an employee stay in good physical condition arguments is insufficient to extend workers compensation coverage to any and all off-duty recreational or athletic activities in which an officer voluntarily chooses to participate.

This case falls squarely into the Peterson McCranie-Peterson v. W.C.A.B. (2012) 77ccc907 (writ denied) kickboxing case where it was found that a general physical fitness encouragement is insufficient to create a requirement for outside training.

[Discussion of timeliness of Petition and propriety of supplemental proceeding omitted.]

RECOMMENDATION

Based upon the foregoing it is respectfully recommended that Applicant's Petition for Reconsideration be denied […] on the merits as discussed herein.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Arbitrator's Findings and Order of August 23, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ NATALIE PALUGYAI, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 13, 2023

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

JOEL RUIZ
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE
LOS ANGELES CITY ATTORNEY'S OFFICE
SEMIAL TREADWELL, ARBITRATOR

DW/oo

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