

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

MIKE HENDERSON, *Applicant*

vs.

**CITY OF GLENDORA;
administered by ADMINSURE, *Defendants***

**Adjudication Number: ADJ12206488
Marina del Rey District Office**

**OPINION AND DECISION AFTER
RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Amended Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on March 24, 2021, wherein the WCJ found in pertinent part that applicant sustained industrial injuries arising out of and in the course of employment (AOE/COE).

Defendant contends that applicant was injured in an off-duty capacity and thus his injuries were not AOE/COE.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that we deny reconsideration. We received an answer from applicant.

We have considered the allegations in the Petition and the answer, and the contents of the Report. Based on our review of the record, for the reasons set forth in the WCJ's Report and in the Opinion on Decision, which we adopt and incorporate as follows, and for the reasons stated below, we will amend the F&A to find that applicant was AOE/COE at the time of his claimed injury on April 2, 2019, and that his claimed injury is not barred by Labor Code section 3600(a)(9) (Finding of Fact No. 1). Otherwise we affirm the decision of March 24, 2021.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no

evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

Accordingly, we amend the F&A to find that applicant was AOE/COE at the time of his claimed injury on April 2, 2019, and that his claimed injury is not barred by Labor Code section 3600(a)(9) (Finding of Fact No. 1). Otherwise, we affirm the decision of March 24, 2021.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of March 24, 2021 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

Finding 1: Applicant was AOE/COE at the time of his claimed injury and his claimed injury is not barred by Labor Code section 3600(a)(9).

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 21, 2021

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

**MIKE HENDERSON
GORDON, EDELSTEIN, KREPACK ET AL.
HANNA, BROPHY ET AL.**

JB/abs

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

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

CASE NUMBERS: ADJ12206488

MICHAEL HENDERSON vs. CITY OF GLENDORA; ADMININSURE

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: HON. SANDRA L. GRAPER

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

I

INTRODUCTION

1. Applicant's Occupation: Sergeant
2. Date of injury: April 2, 2019
3. Parts of Body Alleged: Head, neck, right wrist, rights shoulder, headaches, cardiovascular system, hypertension, vision
4. Identity of Petitioner: Defendant
5. Timeliness: The Petition is timely
6. Verification: The Petition is verified

II

CONTENTIONS

Defendant, City of Glendora; Adminsure, contends that Applicant was not injured while working on duty but rather, was injured in an off duty capacity solely because of the on-premises gym policy and a 2009 "waiver" and, therefore, Applicant is not entitled to workers' compensation benefits.

III **FACTS**

The Applicant, Michael Henderson, on April 2, 2019, while employed as a police officer, Occupational Group Number 490, claims to have sustained injury while working out at the gym on the premises located at the City of Glendora Police Department, Glendora, CA. Applicant claims to have sustained injury arising out of and in the course of employment to his head, neck, right wrist, right shoulder, headaches, cardiovascular system, hypertension, and vision.

On December 30, 2019, the matter proceeded to trial. At trial, Stipulations and Issues were read into the record[.] [T]he sole issue to be decided was injury arising out of and in the course of employment, with all other issues deferred. All parties stipulated on the record that they agreed that the Stipulations and Issues were correctly set forth as stated [December 30, 2019 MOH, p.2, lines 18 1/2 - 19].

On March 19, 2021, the Findings and Award; Opinion on Decision was entered into EAMS. On March 24, 2021, a revised Findings and Award; Opinion on Decision was entered into EAMS and served on the parties. The Applicant was found to have sustained an injury on April 2, 2019, while employed at the City of Glendora, [which] a[rose] out of and in the course of employment. All other issues were deferred.

Defendant timely filed a Petition for Reconsideration on April 12, 2021, on the basis that the WCJ improperly ruled on the finding of AOE/COE. Applicant[’s] Attorney filed an Answer to Defendant’s Petition for Reconsideration, dated April 19, 2021. For the following reasons, the Petition for Reconsideration should be denied.

IV **DISCUSSION**

1. DEFENDANT ARGUES THAT THE APPLICANT WAS INJURED IN AN OFF DUTY CAPACITY PURSUANT TO THE OFF DUTY GYM USE POLICY AND A 2009 “WAIVER” AND THUS APPLICANT IS NOT ENTITLED TO WORKERS COMPENSATION BENEFITS

On December 30, 2019, the matter proceeded to trial before the undersigned judge. The sole issue raised was injury arising out of and in the course of employment.

Based upon the Applicant’s credible testimony and the entire record, this judge found that the Applicant sustained a specific injury on April 2, 2019, arising out of and in the course of employment, when he was working out at the on-premises gym, while on duty at the City of Glendora police department.

Applicant testified as to the specific chronology of the day the injury occurred as follows.

Applicant testified that on April 2, 2019, he was on duty when he was injured. At the February 24, 2020 trial [February 24, 2020 MOH, p.4, lines 12 - 18], Applicant testified that he[]

“arrived at the weight room to do a 30-minute workout. Detective Skibar was already present in the room. Applicant began exercising using the metal dumbbells. During the workout, he started doing tricep extensions over his head. He used the 40-poun[d] dumbbell with three plates on each side. Applicant saw a bright flash and felt an impact to his head. The next thing he remembers is Detective Skibar calling out to him, and he lifted him off the ground to a seated position on a bench. After he sat down on the bench, he saw the dumbbell on the ground, and all the weights were off the bar. He believes he was hit by the plates when the weights came off the bar. At the time he was injured, he was doing two-handed tricep[] extensions.”

Applicant testified that he was authorized to be at work the morning of April 2, 2019, and his testimony is corroborated by the testimony of Captain Matt Williams and Applicant[']s Exhibit 1.

Applicant testified that he sought to change his schedule on the date of injury, to begin work at 6 a.m. to 4 p.m. as he had a parent teacher conference that day with his son. On March 25, 2019, he texted his supervisor, Captain Williams concerning the change in schedule prior to April 2, 2019. The March 25, 2019 text message from the Applicant to Captain Williams’s states, “Matt have a good cruise. Need to get off the next two Tuesdays at 4pm would it be okay to start early with a workout, and work the afternoon to get off at 4pm for the next to [sic] Tuesday’s [sic]. Getting a jump on working out before our DB to beach body challenge.” The Applicant testified in regard to the text message, supra, “[o]n that date he was seeking permission to change his on-duty hours. Applicant testified that if he did not have the injury on that date, he would have simply submitted his time car[d] to be paid staring at 6:00 a.m.” [Applicant’s Exhibit 1; *Ibid*, p.6, lines 2 - 6 1/2].

Captain Williams testified that he acknowledged that the March 25, 2019 text message from Applicant was a request to change his work hours on the date of injury, i.e., April 2, 2019. Applicant[']s Exhibit A sets forth Captain William[']s response to Applicant’s text as, “[s]ounds good to me.” Captain Williams agreed that Applicant had shifted his schedule and was working that morning when he was injured. He further acknowledged that Applicant cannot approve his own timecard and in order to be paid, he had to approve Applicant’s timecard. [January 11, 2021 MOH, p. 5, lines 4-8].

There is further un rebutted testimony that on April 2, 2019, Applicant was the sole acting supervisor at work that morning, as Captain Williams did not begin his shift until 7 a.m. Applicant testified that he could be paged or contacted by phone to meet any work demands, such as a critical incident call, which was an essential function of his job duties as supervisor. Captain Williams confirmed in his testimony that detectives in the detective unit do respond to critical incidents and do assist patrol officers and part of their duties is to protect public safety. [*Ibid*, p.4, lines 22-23].

Labor Code §3600 (a)(3) states that an injury must arise out of or be proximately caused by the worker’s employment to be compensable. The requirement that the injury arise out of employment in the causal sense is broadly interpreted. Under this broad interpretation, an employee may be compensation for any injury that has any connection with work activity, unless the injury is so remotely related to the employment that is not an incident of employment. The industrial cause need not be the sole cause of the injury; it is sufficient if it is a contributory or concurrent cause. [*Madin v. Industrial Acc. Com. (Richardson)* (1956) 46 Cal.2d 90, 21

Cal.Comp.Cases 49, 292 P.2d 892; *Lizama v. Workers' Comp. Appeals Bd.* (1974) 40 Cal.App.3d 363, 39 Cal.Comp.Cases 455; *Murphy v. Workers' Comp. Appeals Bd.* (1978) 86 Cal.App.3d 996, 150 Cal.Rptr. 561, 43 Cal.Comp.Cases 1265].

Labor Code §3600(a)(9) does not bar injury occurring on premises during regular work hours when an employee is compensated for the time [*Sahm v. San Mateo-Foster City School District*, 2015 Cal.Wrk.Comp. P.D.LEXIS 27].

The Applicant as well as the defense witnesses testified to [] the purpose and use of the gym by the City of Glendora police officers.

The Applicant testified [*Ibid*, p. 5, lines 22-25] that, “[h]e had previously used the weight room during his paid break and/or lunch break. It had never been communicated to the applicant that he could not use the weight room during his break and/or lunch break. During the course of his career when the applicant used the weight room to work out, he testified he is working out in part to maintain his physical obligations and physical fitness. This is his whole reason to maintain physical fitness. During the course of his employment, he has not generally used the weight room as his off- duty gym.”

Detective Michael Skibar testified [February 24, 2020 MOH, p. 11, lines 6-14 1/2], that he was working out at the police gym on April 2, 2019, and he was present when Applicant was injured at the gym. Referencing Defendant’s Exhibit A, i.e., the waiver, he testified that he “has not had any formal training regarding this document. Over the past 10-11 years, [he] has worked out regularly. He has not seen a sign posted that said he could not work out while on duty. [He] testified that the[] gym is there for the purpose of providing a facility in order to maintain a certain level of fitness that benefits the community,” and “he in not aware of anyone being disciplined for using the gym during work hours. He testified that the room itself and the structure [are] maintained by the department.”

Captain Matt Williams testified regarding the use of the gym that, “[i]n his supervisory role, part of his duty is to review the department policies with the officers because there is no formal policy [regarding use of] the gym. He does recall an email with a prior captain that stated that there is a requirement to sign the waiver before using the gym. The witness formerly served as a board member of the Police Officers Association. He does not believe that the waiver is in the collective bargaining agreement. He is not aware of a memorandum of understanding regarding the use of the gym. [He] is not sure who drafted the waiver.” [January 11, 2021 MOH, p. 4, lines 14-25].

Finally, it is Defendant’s contention the 2009 “waiver” that Applicant signed reclassifies Applicant’s injury as occurring “off duty.”¹

Applicant signed defendant’s Exhibit A, titled “FITNESS ROOM RELEASE AND WAIVER AGREEMENT,” on December 24, 2009. * * * There is testimony by Applicant and witnesses that the 2009 “waiver” was routinely not followed by the Glendora Police Department

¹ We omit the discussion of waiver in the WCJ’s Report because a general release of an injury that may occur in the future is generally not enforceable in workers’ compensation. (Labor Code §§ 5000, et seq.; Cal. Code Regs., tit. 8, § 10700(b) (eff. Jan. 1, 2020).)

for the SWAT training purposes, and other individual employees throughout the years of Applicant's employment.

Further, there is testimony of both Applicant and Lieutenant Chris Stabio [October 26, 2020 MOH, p.5, lines 5-7], that the gym use and policy is not part of the police union's Memorandum of Understanding. In addition, there are no signs at the gym or any other location at the City of Glendora police department regarding the on premises gym.

Pursuant to [Cal. Code Regs.,] tit. 8, § 9881(c)(4), an employer must post notice to its employees advising that it may not be responsible for an injury due to the employee's voluntary participation in an off-duty recreational, social or athletic activity that is not part of the employee's work-related duties.

By its terms, *Labor Code §3600(a)(9)* bars benefits only for *off-duty* recreational, social or athletic activities. In *City of Chino v. WCAB (Alvo)* (2007) 72 Cal.Comp.Cases 362 (writ denied), the Appeals Board held that a police officer who sustained an injury to his left knee while participating in an employer-sponsored soccer game was not barred by *Labor Code §3600(a)(9)* when the employee was allowed to play during regular work hours and received his regular pay at the time of injury.

Further, Applicant testified that he used the on-premises gym throughout its existence and at times while on duty. [February 24, 2020 MOH, p.9, lines 6-8]. He was never instructed by a supervisor[] not to do so. [*Ibid.*, p.5, lines 12-15]. There is no evidence that his supervisor, Captain Williams ever[] communicated to him prior to April 2, 2019 that he was precluded from using the on premises gym while on duty. There is no evidence in the record of any department policy that required Applicant to seek permission from his supervisor to work out at the on premises gym or seek approval to work out to meet the requirements of the job.

* * *

As a final point, this judge finds that the Applicant had both a subjective and an objectively reasonable belief that his work out on April 2, 2019 was on duty and had been authorized by his supervisor, Captain Matt Williams. [See *Ezzy v. Workers' Comp. Appeals Bd.* (1983) 146 Cal.App.3d 252 [48 Cal.Comp.Cases 611].)

Applicant testified that, “[h]e did not ask Lieutenant Williams if he could work out on duty. He thought that by the text message he was asking permission to use the gym while on duty. On the SWAT team, he was told that he would be using the gym while on duty. This practice continued up to and including the last few month[s.]” [January 11, 2021 MOH, p. 6, lines 19 1/2 - 22].

In this case, Applicant was an employee on the City of Glendora's premises at the time of injury, while on paid duty as the only supervisor on duty, and while required to be available to respond to a critical incident call, sustained an injury on the premises of the City of Glendale police department arising and in the course of his employment.

Based upon the entire record, it is the undersigned WCJ's opinion that on April 2, 2019, while Applicant was working on duty for the City of Glendora police department sustained injuries which arose from and in the course of his employment.

V

RECOMMENDATION

It is respectfully recommended that Defendant's Petition for Reconsideration be denied in its entirety.

Date: April 26, 2021

Hon. Sandra L. Graper
Workers' Compensation Administrative Law Judge

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

CASE NUMBERS: ADJ12206488

MICHAEL HENDERSON vs. CITY OF GLENDORA; ADMININSURE

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: HON. SANDRA L. GRAPER

OPINION ON DECISION

INJURY AOE/COE:

Applicant, Mike Henderson, while employed on duty on April 2, 2019, as an Investigations Bureau Sergeant with the Glendora Police Department, claims to have sustained injury arising out of and in the course of employment to his head, neck, right wrist, right shoulder, headaches, cardiovascular system, hypertension, and vision.

The court having heard and considered the credible testimony of the Applicant, and credible testimony of defense witness, Captain Matt Williams, all of the Exhibits admitted into evidence and the entire record, finds that Applicant sustained injuries arising out of and in the course of his employment at the City of Glendora as a result of his work out accident. The injuries Applicant sustained occurred while working on duty. These facts are a determination of the court as an exception to Labor Code §3600 (a)(9).

At the February 24, 2020 trial, Applicant testified that he sought to change his schedule prior to the date of injury, to work from 6 a.m. to 4pm., as he had a parent conference for his son. He texted his supervisor, Captain Williams concerning the change in his schedule on April 2, 2019. Captain Williams acknowledged and accepted his request. [MOH, February 24, 2020, p.4, lines 21 - 25, p.5, line 1 and MOH, January 11, 2021, p.6, lines 2-3].

Defense witness, Captain Williams testified and acknowledged the March 25, 2019 text message request from Officer Henderson. Captain Williams stated that, "he agreed that the Applicant had shifted his schedule and was on the clock that morning. He acknowledged that applicant cannot approve his own time card. The witness approves the officers' time cards. The witness acknowledged that the applicant was changing his time that morning", and that, he approved the change in Applicant's work hours on April 2, 2019. [Ibid, p.5, lines 4-8].

In addition, the March 25, 2019 text message from the Applicant to Captain William states, “Matt have a good cruise. Need to get off the next two Tuesdays at 4pm would it be okay to start early with a workout, and work the afternoon to get off at 4pm [] for the next to [sic] Tuesday’s [sic]. Getting a jump on working out before our DB to beach body challenge.” [Applicant’s Exhibit 1].

The Applicant testified in regard to the text message, supra, “[o]n that date he was seeking permission to change his on-duty hours. If he was using his benefit hours, he would have just used his benefits hours. Applicant testified that if he did not have the injury on that date, he would have simply submitted his time card to be paid starting at 6:00 a.m.” [*Ibid*, p.6, lines 2 1/2 to 5].

Further, this judge finds that the Applicant had both a subjective and an objectively reasonable belief that his work out on April 2, 2019 was on duty and had been authorized by his supervisor, Captain Matt Williams [See *Ezzy v. WCAB*, 145 CA3d 252, 48 California Comp. Cases 611 (1983)].

Applicant testified that, [h]e did not ask Lieutenant Williams if he could work out on duty. He thought that by the text message he was asking permission to use the gym while on duty. On the SWAT team he was told that he would be using the gym while on duty. This practice continued up to and including the last few months” [*Ibid*, p.6, lines 19 1/2 - 22].

For all the foregoing reasons, this judge finds that Applicant was working in an on duty capacity for the City of Glendora at the time of his injury, and sustained injury arising out of and in the course of his employment while working out at the on-site Fitness Room/Gym. All other issues and a determination as to the specific body part(s) injured are deferred for further development of the record.

Date: March 24, 2021

Hon. Sandra L. Graper
Workers’ Compensation Administrative Law Judge