WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

THOMAS D'ALESSANDRO, *Applicant*

vs.

CITY OF MENIFEE; permissibly self-insured, *Defendant*

Adjudication Number: ADJ16610370
Riverside District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of our September 30, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (O&O) wherein we granted reconsideration of the July 9, 2024 Findings and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) and rescinded and substituted the F&O with a new F&O finding injury arising out of and in the course of employment (AOE/COE) to the left knee based upon applicant's satisfaction of the two-prong test under *Ezzy v. Workers' Comp. Appeal Board* (1983) 146 Cal.App.3d 252, 260 [48 Cal.Comp.Cases 611].

Defendant contends that the Workers' Compensation Appeals Board erred when it relied upon the August 17, 2021 email from team lead, Lieutenant Heriberto Gutierrez, as a basis for its decision. (Petition, p. 5.) Defendant also argues that applicant did not have a "subjective belief that participation in an off duty jiujitsu class was expected by his employer," and even if he did, his belief was "not a reasonable one." (Petition, p. 2.)

We have received an Answer from applicant. We have not received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ.

We have considered the Petition for Reconsideration (Petition), the Answer, and have reviewed the record in this matter. For the reasons discussed below, we will deny the Petition.

FACTS

Applicant claimed that while employed by defendant as a police officer on August 8, 2022, he sustained an industrial injury to left knee. Applicant was taking an off-duty jiu-jitsu class when the injury occurred.

At the time, applicant was a member of and instructor for the city of Menifee's defensive tactics team. The team was responsible for training officers in defensive tactics. There were five instructors, including applicant. (Minutes of Hearing and Summary of Evidence (MOH & SOE), May 7, 2024, p. 4.)

In 2021 – 2022 the instructors underwent an Artemis defensive training course, and in 2022, Gracie survival tactics were included. (*Id*. at p. 11.) Techniques learned in the trainings came from a variety of disciplines, including jiu-jitsu. (*Id*. at p. 10.)

Applicant claimed that he believed participation in his off-duty jiu-jitsu class was expected based upon an email from the team lead, discussions with co-workers, and applicant's own belief that the class would make him a more competent employee. (Report, p. 3.)

The email from team lead, Lieutenant Heriberto Gutierrez stated, in relevant part, as follows:

> "The goal [for the Defense Tactics Team] is to develop you all in a variety of defense tactics disciplines so that we may collectively expand our current d-tac training program."

It goes on further:

> "Take a look at your calendars and come up with a date where we can all gather to discuss our program and to practice our current Artemis tactics. This will allow us to stay sharp. In the meantime, please stay in shape. Eat healthy and workout. More fruit and less donuts from the lounge. Our officers look at us for guidance when it comes to defensive tactics, so we should definitely look the part. I look forward to more training and to getting together soon."

(Joint Exhibit 4, Email from Lieutenant Heriberto Gutierrez, August 17, 2021.)

Injury AOE/COE was denied by defendant and on May 7, 2024, the matter proceeded to trial.

On July 9, 2024, the WCJ found that the injury was barred under Labor Code section[1] 3600(a)(9) because applicant did not meet the second prong of the two-prong test under *Ezzy*.

On July 25, 2024, applicant filed a Petition for Reconsideration of the WCJ's July 9, 2024 Findings and Orders, and on September 30, 2024, the WCAB issued an Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration rescinding and substituting the WCJ's F&O with a new F&O which found injury AOE/COE to the left knee.

DISCUSSION

I.

Preliminarily, former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected under the Events tab in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on October 22, 2024, and 60 days from the date of transmission is December 21, 2024, which is a Saturday. The next business day that is 60 days from the date of transmission is Monday, December 23, 2024. This decision was issued by or on December 23, 2024, so that we have timely acted on the petition as required by section 5909(a).

[1] All further references will be to the Labor Code unless otherwise indicated.

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to our review of the record, we did not receive a Report from the WCJ. However, a notice of transmission was served by the district office on October 22, 2024, which is the same day as the transmission of the case to the Appeals Board. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1), and consequently they had actual notice as to the commencement of the 60-day period on October 22, 2024.

II.

Turning to the merits of the Petition, defendant contends that the Appeals Board incorrectly applied *Ezzy* by finding applicant had a "reasonable subjective belief that participation in an off-duty jiu-jitsu class was expected by his employer." (Petition, p. 1.) Defendant further contends that applicant's "subjective belief" was based upon an August 17, 2021 email from applicant's team lead, Lieutenant Heriberto Guitierrez, which, defendant argues, can only be viewed as "encouragement to maintain general fitness" and therefore cannot serve as a basis for finding satisfaction of the second element under *Ezzy*. (Petition, p. 5.)

As noted in our September 30, 2024 O&O, section 3600(a)(9) states, in relevant part, that compensation does not exist where an injury arises ". . . 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." In determining whether an off-duty athletic activity constitutes an industrial injury, the Appeals Board must determine whether the activity is a reasonable expectancy of employment, which consists of two elements: (1) whether the employee subjectively believes that the activity is expected by the employer and (2) whether that subjective belief is objectively reasonable. (*Ezzy*, *supra*, at 260.)

With respect to the first element of the test under *Ezzy*, as indicated by the WCJ in his July 9, 2024 Opinion on Decision (OOD), applicant "subjectively believed that his participation in the

activity at the jiu-jitsu gym was expected by his employer." (OOD, p. 3.) This belief, as testified to by applicant during the May 7, 2024 trial, was based upon the August 17, 2021 email from applicant's team lead, Lieutenant Heriberto Gutierrez, as well as discussions with peers which led applicant to believe that "training outside of work made him more competent and training for one week was not sufficient." (*Id*.) In light of the foregoing, applicant's subjective belief is well established. Further, as the first element pertains to a *subjective* belief, defendant would be hard pressed to prove otherwise absent direct, explicit evidence to the contrary.

With respect to the second element under *Ezzy*, whether applicant's subjective belief was objectively reasonable, defendant argues that the cases relied upon by applicant, *Wilson v. Workers' Comp. Appeals Bd.* (1987) 196 Cal.App.3d 902 [52 Cal.Comp.Cases 369] and *Tomlin v. Workers' Comp. Appeals Bd.* (2008) 162 Cal.App.4th 1423 [76 Cal.Comp.Cases 672], are distinguishable in that in both cases, the officers "were specifically training for fitness tests required by the employer." (Petition, p. 3.) In *Wilson*, the Court of Appeal found compensable an injury sustained by a police officer while running to train for a fitness test. The applicant in *Wilson* testified that his superiors told him off-duty conditioning would be necessary to maintain the physical qualifications of the job. (*Id*.) The Court of Appeal therefore held that applicant's subjective belief was objectively reasonable. Similarly, in *Tomlin*, the applicant, a member of the SWAT team, was injured while running. Applicant was training for an annual physical examination, and he was encouraged that he train off-duty. The Court of Appeal therefore found compensability despite applicant being on vacation at the time of injury.

As discussed in our September 30, 2024 O&O, although it is true that the officers in *Wilson* and *Tomlin* were training for fitness tests which required the subject activity, it is also true that physical fitness was required as a condition of the applicants' jobs and how they were to maintain their fitness and otherwise train was not limited by superiors. Further, the Court of Appeal in *Wilson* noted that "proving express or implied pressure upon the employee serves to establish the objective reasonableness of that employee's belief that he or she was required to participate in the off-duty activity." (*Wilson*, *supra* (quoting *Aetna Casualty & Surety Co. v. Workers' Comp. Appeals Bd.* (1986) 187 Cal.App.3d 922, 931.).) In our O&O, we therefore found like *Wilson*, in the instant matter, maintenance of physical fitness was either directly expressed or implied, as evidenced by the August 17, 2021 email from Lieutenant Gutierrez wherein he specifically requested officers to "stay in shape" and "workout." (Joint Exhibit 4.) He also underscored the fact

that other officers looked towards the team for "guidance when it comes to defensive tactics" and as such, team members were to "definitely look the part." (Ibid.)

Defendant seems to believe that our decision was solely based upon the August 17, 2021 email from Lieutenant Gutierrez. As indicated in our O&O, however, aside from the August 17, 2021 email communication, on-the-job training included Artemis techniques and Gracie Survival Tactics (GST), and applicant was expected to continue progression in these trainings. (Ibid.; Minutes of Hearing and Summary of Evidence, May 7, 2024, p. 4.) Lieutenant Gutierrez also noted that "the goal" was to develop everyone "in a variety of defense tactics disciplines" so that they could "collectively expand" on the current "d-tac training program." (Joint Exhibit 4.) Further, as testified by applicant, GST training included techniques learned from jiu-jitsu and current and past members of the team had taken or were taking jiu-jitsu classes. (Ibid.; MOH & SOE, p. 6.)

Based upon the foregoing, we therefore continue to find it objectively reasonable that applicant subjectively believed continued training in jiu-jitsu was expected by the employer, and as such, we continue to find that both elements of the test under *Ezzy* have been met. Accordingly, we deny defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of our September 30, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I DISSENT, (See attached Dissenting Opinion.)

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 19, 2024

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

THOMAS D'ALESSANDRO
LAW OFFICES OF SMITH AND GARFUNKEL
HANNA, BROPHY, MacLEAN, McALEER & JENSEN
EMPLOYMENT DEVELOPMENT DEPARTMENT

RL/*cs*

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

DISSENTING OPINION OF COMMISSIONER JOSE RAZO

I respectfully dissented from the majority's Opinion of September 30, 2024 and continue to respectfully dissent today. I would have denied the Petition for Reconsideration for the reasons stated in my Dissenting Opinion of September 30, 2024, which I adopt, incorporate, and quote below.

> As discussed, to establish injury AOE/COE, the Appeals Board must determine whether the off-duty recreational activity causing the subject injury is a reasonable expectancy of employment. (*Ezzy v. Workers' Comp. Appeal Board* (1983) 146 Cal.App.3d 252). The reasonable expectancy test consists of two elements: (1) whether the employee subjectively believes that the activity is expected by the employer and (2) whether that subjective belief is objectively reasonable. (*Id*.) In the instant case, applicant has not met his burden of proof in establishing injury AOE/COE as he has failed to prove the second element of the test.
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> Applicant contends that he believed participation in jiu-jitsu classes was expected by defendant and that this belief was objectively reasonable. He relies on *Wilson v. Workers' Comp. Appeals Bd.* (1987) 196 Cal.App.3d 902 [52 Cal.Comp.Cases 369] and *Tomlin v. Workers' Comp. Appeals Bd.* (2008) 162 Cal.App.4th 1423 [76 Cal.Comp.Cases 672]. Applicant's case, however, is distinguishable from *Wilson* and *Tomlin* and other cases wherein injury was found compensable. (See also *Kidwell v. Workers' Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1130 [60 Cal.Comp.Cases 296].) In these cases, the police officers were training for specific tests required by their employment when they became injured. Per the WCJ, the officers "were required to pass tests that involved the type of exercise the officer[s] w[ere] performing while off duty." (Report, p. 3.) This was not the case here. Applicant was not injured while participating in a specific athletic activity that was to be tested as a condition of employment.
>
> Applicant's case is more akin to *City of Stockton v. Workers' Comp. Appeals Bd.* (*Jenneiahn*) (2006) 135 Cal.App.4th 1513 [71 Cal.Comp.Cases 5]. In *Jenneiahn*, the police officer was injured while playing basketball off-duty. He was not training for a specific test, but rather, working out to maintain general fitness for duty. The court found no injury AOE/COE and 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*, *supra*, at p. 1526.)
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> As in *Jenneiahn*, in the current case applicant appeared to be taking jiu-jitsu classes off-duty to maintain his general fitness rather than to prepare for a specific fitness test. Per Lieutenant Gutierrez, jiu-jitsu was "not required" and some instructors "did not have any martial arts experience." (Minutes of Hearing and Summary of Evidence, May 7, 2024, p. 11, emphasis added.) Further, applicant was

not hired because of any specific training in jiu-jitsu. Rather, he was hired because of his ability to communicate and implement "teaching policy." (*Id.* at 13.)

The fact that jiu-jitsu was incorporated into training techniques for the defensive tactics team is not persuasive. Lieutenant Gutierrez noted that "Artemis techniques are based upon a *variety* of disciplines" including taekwondo and aikido, among others. (*Id*., emphasis added.) This was not contradicted by applicant's testimony.

Additionally, in the August 17, 2021 email to the defensive tactics team, Lieutenant Gutierrez made no mention of training in jiu-jitsu specifically. Rather, he spoke generally about staying in shape, asking officers to "eat healthy and workout." There was no direct or implied request by Lieutenant Gutierrez or any else on the team to participate in off-duty jiu-jitsu classes. To say that the email communication constituted any such request is a stretch. There was also no pre-approval for the jiu-jitsu classes. As such, based upon the facts of this case, there is no basis for applicant's contention that there is an objective reasonable expectation that off-duty jiu-jitsu was required, either to stay in shape, or otherwise.

In light of the foregoing, I would deny the Petition for Reconsideration and affirm the July 9, 2024 Findings and Orders.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 19, 2024

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

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EMPLOYMENT DEVELOPMENT DEPARTMENT

RL/*cs*

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