WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DAVID FRIEDRICH, *Applicant*

vs.

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

Adjudication Number: ADJ19139846 [Arbitration Case No. LAPPL-ADR-16050]

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of an arbitrator's Findings and Order of March 15, 2024, wherein it was found that "The left shoulder injury [applicant] sustained on October 2, 2022 did not arise out of an occur in the course of employment." The arbitrator thus issued an order that applicant take nothing by way of his claim. In the Opinion on Decision, the arbitrator explained that she found that applicant was not in the course of employment at the time of injury pursuant to Labor Code Section 3660(a)(9) which states the employer is not liable for any injuries which occur during voluntary participation in an off-duty recreational, social, or athletic activity not constituting a part of the employee's work related duties, unless it was a reasonable expectancy of, or was expressly or impliedly required by the employment.

Applicant contends that the arbitrator erred in finding that he was not in the course of employment at the time of injury and in applying Labor Code section 3600(a)(9), arguing that he was on a special on-call status that he was being compensated for at the time of injury, and thus was not "off-duty" at the time of injury.

We have received an Answer from defendant and the arbitrator has filed a Report and Recommendation on Petition for Reconsideration (Report). Additionally, applicant has requested that we accept a Reply to the arbitrator's Report. We accept this Reply for filing, and we have considered its contents.

We agree that the unrebutted evidence shows that applicant was on a special, paid on-call status and the time of injury and was thus on duty, and therefore in the course of employment. Because his act of weight training while being on-call was not an unreasonable deviation from the

course of employment, his injury was sustained in the course of and arising out of employment and is thus compensable. We thus grant reconsideration, rescind the arbitrator's decision, and issue a new decision finding industrial injury and deferring all other issues.

Applicant was a detective assigned to the special investigations section of the robbery homicide division of the Los Angeles Police Department (LAPD). (Arbitration Transcript at p. 55.) Applicant's supervisor at the time of injury testified at the arbitration hearing that this is a highly specialized unit that deals with kidnappings, surveilling highly dangerous recidivist criminals, apprehending high risk fugitives, and other special missions including serial killers, terrorist suspects, and crimes involving celebrities or other VIPs. (Arbitration Transcript at p. 13.) Because of the high level of skill and training involved, and because of the demands of the job, members of this unit were paid substantially more than other LAPD members with the same classification. (Arbitration Transcript at p. 17.)

Applicant's supervisor testified that 13 members of this unit must be on-call at all times. (Arbitration Transcript at p. 18.) The supervisor explained this on-call status as follows:

> First, it means that they have to have their cell phone with them at all times. And we take that very literally. There's an expectation in the unit that when I call, I don't get a voice mail. Someone answers that call at all times. In the middle of the night, when you're working out, when you're having dinner, the phone must be answered. Likewise, if that notification is in the form of a text message, there's an expectation that there's a response within five no more than ten minutes because the call out has exigency to it. We don't get called out for a case that can be put off until the following Monday. If there's a callout on the weekend that means generally someone's life is in danger.
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> Additionally, if you are on-call and you want to leave your residence, let's say for a child's soccer game, you can't bring your children or your family in your care in the Los Angeles city issued vehicle, so you're going to be driving separate from your family to the soccer game. If you want to at the last minute if you were lucky enough to get tickets to the Lakers game and you wanted to enjoy that with your family, theoretically you could do that but you're going to be driving separate. And if at any time during that game you get a call out, there's an expectation you will respond expeditiously to that briefing location. And you have to have all of your equipment with you and if you're going vehicle is going [sic] to be parked at an unsafe location, then you have to park it at the closest police station to that venue.

(Arbitration Transcript at pp. 19-20.)

Applicant's supervisor testified that during the time that a member of the unit was on-call they should not imbibe alcohol or any other intoxicants, stay in the general geographic region, and "be mentally and physically ready to respond." (Arbitration Transcript at p. 41.) During the period that a detective is on-call, they are compensated at a rate of one hour of pay for every six hours on-call. (Arbitration Transcript at p. 52.)

Applicant testified that he was on on-call status at the time of injury, and reiterated his supervisor's testimony that he received special compensation during the period that he was on-call. (Arbitration Transcript at pp. 60-61, 71.) If a member of the unit was actually called in to work during the time they were on on-call status, they were paid the overtime rate. (Arbitration Transcript at p. 61.) Applicant testified that while he was on-call status, besides abstaining from alcohol and other intoxicants or to be outside the general geographic area, he could engage in any reasonable activity. (Arbitration Transcript at p. 89.)

While on on-call status, applicant drove his special employer-provided vehicle to a private gym. (Arbitration Transcript at p. 71.) Applicant testified that he sustained injury when he was lifting weights. (Arbitration Transcript at p. 72.)

We find that applicant's injury was sustained in the course of and arose out of applicant's employment. *Gonzalez v. Workers' Comp. Appeals Bd.* (1986) 186 Cal.App.3d 514 [51 Cal.Comp.Cases 485] is virtually indistinguishable in all material respects with the case at bar. In *Gonzalez*, like here, the injured worker was a detective in his department's violent crimes unit. The applicant in *Gonzalez* was "required periodically to be on standby duty so that, in the event of need, he would be available for immediate call. While on standby, Applicant was paid 10 percent of his regular salary if he was not called, if called he was compensated at his regular hourly wage. Standby duty required applicant to be available for contact by telephone or radio and to be in such mental and physical condition and in such proximity to the County vehicle assigned for his use as to be able to respond to the call within a reasonable time." (*Gonzalez*, 186 Cal.App.3d at p. 517.) The applicant in *Gonzalez* was injured during a softball game. The Board found the applicant's injury non-compensable, applying the predecessor statute to current Labor Code section 3600(a)(9) and finding that the participation in the softball game was not a reasonable expectation of employment.

The Court of Appeal reversed and held that applicant's paid standby duty was not "off duty" employment, and that applicant was thus in the course of employment at the time of his

injury. (*Id.* at pp. 519-521.) Because applicant was in fact on duty at the time of injury, and Labor Code section 3600(a)(9) applies only to "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" (emphasis added), the *Gonzalez* court held that subdivision (a)(9) and the cases interpreting it were simply not relevant. (*Id.* at pp. 519, 520-521.)

Here applicant was under similar constraints to the injured worker in *Gonzalez*. While technological advances since the *Gonzalez* decision have done away with the requirement that applicant carry a radio transmitter with him at all times, applicant was required to be near his employer-issued car, required to be available by phone, and required to be physically and mentally able to respond to any call. Crucially, like in *Gonzalez*, applicant was provided special compensation for this standby or on-call time.

Labor Code section 3600 imposes liability on an employer for workers' compensation benefits only if an employee sustains an injury "arising out of and in the course of employment." Whether an injury arises out of and in the course of employment requires a two-prong analysis. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 650-651 [63 Cal.Comp.Cases 253].) In *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (Vasquez de Vargas)* (1982) 133 Cal.App.3d 643, 652 [47 Cal.Comp.Cases 729], the Court of Appeal explained, "Generally, 'in the course of employment' refers to the time and place of the injury. [Citation.] The phrase 'arise out of employment' refers to a causal connection between the employment and the injury. [Citation.]"

At the time of injury, applicant was in the course of employment. He was compensated for his on-call status. During his on-call status, he was told to be in reasonable geographical proximity to Southern California, to abstain from alcohol or other intoxicants, but was allowed to participate in any reasonable activity so long as he was near his department-provided vehicle. Since applicant was following these parameters at the time of injury, he was in the course of employment. The arbitrator did not consider application of the *Gonzalez* case because it was "not established the Applicant was in fact on-call at the time of his injury." (Report at p. 6.) However, applicant unequivocally testified that he was on on-call status. (Arbitration Transcript at pp. 60-61, 71, 82.) Applicant's supervisor did not recall with certainty at the arbitration hearing one and a half years after the injury whether applicant was on-call or not. (Arbitration Transcript at p. 37, 40.)

However, the supervisor testified that "without checking I'm 90 percent sure he was on-call or on standby that weekend because we were all on-call every single weekend for an untold number of months…." (Arbitration Transcript at p. 40.) The arbitrator points to the Employee's Report of Injury Form (Ex. B) where it was written that "Employee was bench pressing (off duty) to maintain fitness for duty when he heard and felt a tearing in his left pectoral muscle" as evidence that applicant was not on standby duty. However, "off duty" here is ambiguous, and could mean that applicant was not on active duty, rather than standby duty, at the time of injury. This ambiguous evidence does not contradict applicant's unequivocal testimony that he was on standby duty at the time of the injury, and the supervisor's testimony that he was "90 percent sure he was on-call or on standby."

Applicant was thus in the course of employment at the time of injury. Additionally, by application of the "personal convenience" doctrine, applicant's injury arose out of his employment.

The personal convenience doctrine was discussed by the Supreme Court in *Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559 [49 Cal.Comp.Cases 772]. In *Price*, the applicant arrived at his place of work 15 minutes early, as was his habit. Often the work premises were open before his official start time of 8 a.m. On the date of his injury, his workplace was closed. Instead of waiting in front of the door of the business, the applicant went back to his car, which was parked on the street. The applicant put a quart of oil into his car while he waited. While he placed oil into his car, a passing car struck Price's leg.

The Supreme Court relied upon the personal convenience doctrine in finding Price's injury compensable, explaining:

> "Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment." [Citations.] This court has noted that the personal convenience exception "is not limited to acts performed on the employer's premises." [Citation.]
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> Acts of "personal convenience" are within the course of employment if they are "reasonably contemplated by the employment." [Citations.] Courts consider the nature of the act and the nature of the employment, the custom or usage of the employment, the terms of the employment contract, and "other factors." [Citation.] In view of the policy favoring employee compensation, doubts as to whether an act is reasonably contemplated by the employment are resolved in favor of the employee. [Citation.] The evidence presented at the workers'

> compensation hearing indicated that the doors to the workplace were not opened at the same time every morning. Usually they were opened early, but at times they were not unlocked until after the official starting time of 8 a.m. Waiting outside the employer's premises was, therefore, "reasonably contemplated by the employment."
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> As the workers' compensation judge noted, "[when] people are waiting for something to happen, they rarely stand in one spot; 'they occupy.'" However, instead of idly pacing, Price made use of the time by adding oil to his car. His act was not "wholly unreasonable" but was "normal, proper and reasonably to be expected." [Citation.] Performing a minor personal task while waiting to begin work is a "normal human response." Therefore, it is within the reasonable contemplation of the employment contract. [Citation.] As the court in [*North American Rockwell Corp. v. Workmen's Comp. App. Bd. (Saska)* (1970) 9 Cal.App.3d 154, 158 [35 Cal.Comp.Cases 300]] pointed out, "[human] services cannot be employed without taking the whole package." [Citation.]"

(*Price*, 37 Cal.3d at pp. 567-568.)

Here, applicant's going to the gym during his multi-hour standby time was within reasonable contemplation and thus not so wholly unexpected to sever the causal connection between employment and injury. Applicant's supervisor testified that he knew and expected his employees to work out at private gyms near the employees' homes while on standby duty. (Arbitration Transcript at pp. 33-35.) As noted above, Labor Code section 3600(a)(9) which imposes a more stringent analysis and would have required applicant to exercise in a department-approved facility, is not relevant to the facts of this case.

Agreed medical evaluator orthopedist Philip H. Conwisar, M.D. opined that applicant sustained injury as a result of the weightlifting incident. (June 14, 2023 report at p. 9.) We therefore grant reconsideration, rescind the arbitrator's decision, and issue a new decision finding industrial injury and deferring all other issues.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Order of March 15, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of March 15, 2024 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. David Friedrich, while employed on October 2, 2022, as a police officer, occupational group number 490, at Los Angeles, California, by the City of Los Angeles, permissibly self-insured, sustained injury arising out of and in the course of employment to his left shoulder.

2. All other issues are deferred, with jurisdiction reserved.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 3, 2024

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

DAVID FRIEDRICH
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE
LOS ANGELES CITY ATTORNEY
LINDA DAVIDSON GUERRA, 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