WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KEITH LARSON, ***Applicant***

vs.

MORAGA ORINDA FIRE DISTRICT, permissibly self-insured, adjusted by ATHENS ADMINISTRATORS, ***Defendants***

Adjudication Number: ADJ17881925
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on May 3, 2024, wherein the WCJ found in pertinent part that while employed as a firefighter, applicant sustained injury arising out of and in the course of employment (AOE/COE) on June 1, 2023 to his left ankle and left foot while performing his routine workout to maintain his physical fitness for duty.

Defendant contends that applicant failed to prove his subjective belief that off-duty trail running on Mount Burdell to maintain his physical fitness was objectively reasonable as expected by the employer, and thus, applicant did not meet his burden to prove compensability, pursuant to Labor Code section[1] 3600(a)(9).

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto. Based on our review of the record, for the reasons stated in the WCJ's Report, which we adopt and incorporate, and as discussed below, we will deny reconsideration.

As a preliminary matter, we are "mindful of Labor Code section 3202 which mandates: 'The provisions of Division 4 and Division 5 of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of

[1] All statutory references are to the Labor Code unless otherwise stated.

their employment.'" (*Ezzy v. Workers' Comp. Appeals Bd*. (1983) 146 Cal.App.3d 252, 264 [48 Cal.Comp.Cases 611], quoting Lab. Code, § 3202.)

Pursuant to section 3600,

> (a) Liability for the compensation provided by this division . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:
>
> (9) 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**. ...

(Lab. Code, § 3600(a)(9), emphasis added.)

With respect to injuries sustained during voluntary participation in off-duty athletic activities, section 3600, subdivision (a)(9) states the rule -- recovery may be had for injuries arising out of and in the course of employment if those injuries do not arise out of voluntary participation in off-duty athletic activities. The section then states exceptions to the rule of noncompensability. Where off-duty athletic activities are a "reasonable expectancy of, or are expressly or impliedly required by, the employment" injuries arising therefrom *are compensable*. (*Ezzy, supra*, at 259, emphasis in original.)

As set forth in *Ezzy*, the test of "reasonable expectancy of employment" in this context 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, supra*, at 260.) Based on the record before us, applicant met his burden of establishing both elements.

Here, applicant testified that when he previously worked for the U.S. Forest Service and at Cal Fire he was taught that trail running is the best way to get in shape and stay in shape for wildland fire season.[2] (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 9, 2024 trial, pp. 4, 7.) At the Forest Service and Cal Fire, he was encouraged to go on trail runs (MOH/SOE, p. 9.) Applicant noted that the Moraga Orinda Fire District (MOFD) has an extensive wildfire history. (MOH/SOE, p. 6.) The district also provides automatic aid, including responding

[2] We use wildland fires and wildfires interchangeably in this decision.

to wildfires. (MOH/SOE, p. 6.) In 2022, he estimates that he responded to about seven wildland fires. (MOH/SOE, p. 10.) In 2023, applicant responded to two or three wildfires. (MOH/SOE, p. 11.) MOFD also provides mutual aid anywhere in the state. (MOH/SOE, p. 6.) In 2021, he was deployed to work on suppression and defense for the Dixie Fire, which burned almost a million acres. (MOH/SOE, p. 6.) He also provided aid for a fire in Lassen National Forest. (MOH/SOE, p. 6.) He testified that the terrain in Lassen National Forest was steep, unforgiving forest country, similar to a trail run. (MOH/SOE, p. 6.)

Applicant testified that anyone who is not exercising off duty is not up to the standards of the department. (MOH/SOE, p. 14.) He is unaware of anyone in the department who does not exercise off duty, including his captain and the fire chief. (MOH/SOE, p. 14.) Applicant has discussed trail running with his captain and his coworkers and they know that he runs off duty. (MOH/SOE, p. 8.) Running on a trail is dynamic, with the footing and terrain changing constantly. (MOH/SOE, p. 7.) Although he occasionally runs trails on Mt. Tam and in Orinda, Mount Burdell is applicant's preferred spot for trail running. (MOH/SOE, p. 7.) Mount Burdell mimics steeper hills and also he can shorten and lengthen his runs for stamina and endurance. (MOH/SOE, p. 7.)

Although MOFD does not <u>require</u> off-duty exercise, fire captain Jared Costanza testified that he believes everyone in the department is exercising off-duty. (MOH/SOE, p. 15.) They are held to the highest standard of fitness. (MOH/SOE, p. 14.) Captain Costanza feels that a firefighter cannot adequately do their job without off-duty training. (MOH/SOE, p. 15.) If they are not in shape, they cannot go rescue someone in a burning building. (MOH/SOE, p. 15.) He also testified that wildfires are a huge concern. (MOH/SOE, p. 15.) Captain Costanza testified that firefighters on his unit regularly discuss their workout plans and he recalls having these conversations with applicant specifically. (MOH/SOE, p. 14.) He is aware that applicant runs trails off duty and he testified that he "feels that this is the best way to get in shape to do what they do for a living." (MOH/SOE, p. 15.) Captain Costanza added that it is not possible for applicant to run trails while on duty (*Id*.)

Defendant urges us to find that applicant's injuries are not compensable in part because applicant was not training for any employer mandated test, promotional opportunity, or specialty team. (Petition, p. 10.) We remind defendant that the analysis here should be based on whether the activities are a reasonable expectancy of, or are expressly or impliedly required by, the

employment, and not necessarily limited to whether the activity was in preparation for a test, opportunity, or team. (Lab. Code, § 3600(a)(9).)

In addition to the cases analyzed in the Report, defendant cites *Wilson v. Workers' Comp. Appeals Bd*. (1987) 196 Cal.App.3d 902 [52 Cal.Comp.Cases 369], which is particularly instructive. "First, we consider whether petitioner subjectively believed his participation in the athletic activity was expected by [the employer]." (*Wilson v. Workers' Comp. Appeals Bd*. (1987) 196 Cal.App.3d 902, 906 [52 Cal.Comp.Cases 369].) In *Wilson*, the Court of Appeal found that this standard was easily met when, as here, Wilson testified that his superiors told him off-duty conditioning would be necessary to maintain the physical qualifications of the job. (*Id*.) Second, with respect to whether that belief is objectively reasonable, "[c]ourts applying this test analyze and weigh factors evidencing implied employer approval or encouragement." (*Wilson, supra*, at 906-907.)

Similar to *Wilson*, applicant here "was not compensated for his off-duty running and other conditioning. Nor did [the employer] provide equipment, facilities or supervision for [applicant's] off-duty workouts." (*Id*., at 907.) However, the Court concluded that these facts were not necessarily determinative. (*Id*.) Here, as in *Wilson*, physical fitness is indisputably a requirement applicant's job and applicant was made aware that off-duty conditioning activities were necessary to perform the job. (*Wilson, supra*, at 908.)

Courts have also stressed the benefit to the employer as a factor supporting compensability. (*Id*., see *Ezzy, supra*; *Smith v. Workers' Comp. Appeals Bd*. (1987) 191 Cal.App.3d 127 [52 Cal.Comp.Cases 162].) Here, the record shows that defendant derives benefit from applicant's off-duty training. Applicant testified that endurance is hugely important for fighting wildfires, which can last days (he was in Susanville fighting the Dixie fire for eight consecutive days). (MOH/SOE, p. 13.) Captain Costanza testified that a firefighter cannot adequately do their job without off-duty training. (MOH/SOE, p. 15.)

Based on the record before us, applicant has demonstrated that (1) he subjectively believes that his participation off-duty exercise is expected by the employer, and (2) that this belief is objectively reasonable. (*Ezzy, supra*, at 260; *Wilson, supra*.) Based on the testimony, there is a reasonable expectancy of off-duty exercise, such as trail running. (Lab. Code, § 3600(a)(9).) Thus, compensability for applicant's injuries is not barred by section 3600(a)(9) and we will not disturb the WCJ's findings. Accordingly, we deny defendant's petition for reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 29, 2024

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

KEITH LARSON
BOXER & GERSON, LLP
LAUGHLIN, FALBO, LEVY & MORESI

JB/*pm*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Date of Injuries/Body Parts:	06-01-2023/left ankle and left foot
Occupation:	firefighter
Petitioner:	Defendant Moraga Orinda Fire District by Athens Administrators
Timeliness:	The petition, filed on 05-28-2024, is timely
Verification:	The petition is not verified

II. FACTS

The trial in this case took place in person as memorialized in the Minutes of Hearing/Summary of Evidence of 04-09-2024, hereinafter "MOH/SOE." I issued Findings and Award and an Opinion on Decision dated 05-03-2024. According to the Petition for Reconsideration dated 05-28-2024, the Petitioner feels aggrieved alleging binding case law was not expressly addressed in the opinion. Specifically, petitioner contends that no citation to the test, facts, or holdings of any interpreting the Labor Code §3600(a)(9) regarding the off-duty recreational injury rule and related to the *Ezzy v. WCAB* (1983) 146 CA3d 252 doctrine. Because the facts are undisputed, I now submit an augmented version of the opinion as my Report and Recommendation.

Applicant filed an Answer to Petition for Reconsideration dated 06-07-2024. Additional time was afforded by the Recon Unit at the Appeals Board for the filing of this report as the undersigned was out of the office from the filing of the Petition for Reconsideration until 06-10-2024.

The facts in this case are undisputed: Applicant Keith Larson is employed with the Moraga Orinda Fire District (MOFD or the employer). (MOH/SOE at p. 2, Stipulation number 1.) His working job title is engineer-paramedic. (MOH/SOE at p. 4, lines 11-14; 5, lines 24-25.) He sustained an injury to the left ankle and foot on 06-01-2023 when he was running on trails. (*Id.*) At trial, applicant testified that he was injured when running on a trail on Mount Burdell located near his home in Novato, California, to maintain his fitness on his job and to prepare for the upcoming wildland season. (*Id.*) Applicant was not on duty when the injury occurred. (MOH/SOE

at 11, 16-17.) At the time of the injury, he was signed up to run the Dipsea race and was an automatic qualifier for this race based on his past performance. (MOH/SOE at 11, 18-23.) Applicant denies that he was specifically training for the Dipsea race at the time of injury. (*Id.*; and at 12, line 7.)

Running trails is important for wildland fire season. (*Id.*) Applicant began his career as a firefighter with the U.S. Forest Service and worked as a firefighter for Cal FIRE. Both jobs required trail runs while on duty as a unit because it is the best conditioning for fighting wildland fires. (MOH/SOE at 5, 1-20.) Applicant also worked for Kentfield as a volunteer and seasonal firefighter for seven years. (*Id.*) Fighting wildland fires is the same work regardless of the employers. (*Id.*) For all these jobs, he ran trails off duty to maintain his fitness.

Applicant has been running trails for his own fitness since high school cross country. (MOH/SOE at 7, lines 4-16; at 17, lines 18-20; at 8, lines 10-17.) Defendant notes that at the time of the injury, applicant was clad in shorts, running shoes and a t-shirt, that is, normal running gear, when he was injured. (MOH/SOE at 12, lines 11-13.) He has a long history of running in competitive races including the Dipsea Trail race which is described by defendant's brief as a notedly grueling 7.4-mile race. (*Id.*) Applicant testified that running is an integral part of his workout regime, which includes working out at a private gym when he is off duty and working out 90 minutes during the workday, as required by the employer. (*Id.*) In addition, at station 45 where applicant works, there is a "challenge board" and the fire chief is at top of some lists or top three on most. (*Id.*, at 7, lines 17-20; at 14, lines 10-12.)

Applicant passed the CPAT test, a test of physical fitness, to qualify for his job but concedes that there is no physical re-testing required for his job and no one judges his fitness for duty. (MOH/SOE at 8, lines 18-25; at 13, line 1 to 14, line 3.) And he acknowledges that that the employer has no prescribed exercise or fitness regime; rather there is a strong culture emphasizing physical fitness for duty. (*Id.*, at 10, lines 11-12.) He testified that he faced no known disciplinary/employment related repercussions for failure to maintain physical fitness. (*Id.* at 12, lines 18-20). Applicant testified that MOFD did not tell him to trail run. (*Id.* at 4, lines 14-15, and at 7, line 21, and at 10, lines 11-13, and at 12, line 17). Applicant works out on duty with equipment at the station but has never done a trail run during work time. (*Id.*, at 11, lines 9 -11.) Nevertheless, applicant believes all of his co-workers exercise off duty to maintain physical fitness for the job,

and that everyone knows that applicant is a runner and works out off duty. (*Id.*, at 7, line 24 to 8, line 3.)

Witness Jared Costanza, applicant's supervisor, testified that as a fire captain, he expects his employees to exercise off duty and does so himself. (MOH/SOE at 15, lines 5-7.) Captain Costanza does not believe a firefighter can adequately do the job without training off duty. (*Id.*) Furthermore, the employer holds the firefighters the "highest standard for fitness" and the firefighters on his unit stay fit and discuss work out plans for off duty to stay in shape and diet. (*Id.*, at 14, lines 19-22.) Captain Costanza holds his subordinates to "the highest standard for physical fitness," routinely monitors and discusses their work-out plans and fosters a "culture" that is based on the "unwritten rule" that a firefighter cannot do their job if they are not in shape. (*Id.*, at 14, line 16-15, line 10.) While "MOFD does not require off-duty exercise," Captain Costanza recognizes "a firefighter cannot adequately do their job without off-duty training." (*Id.*) The employer provides 90 minutes per shift or per day for exercise, however, it is the firefighters themselves who are in charge of making sure this is done. (*Id.*, at 14, line 25.) Like applicant, the witness confirmed that there is a variety of workout equipment at each fire station, including cardio machines and weights. Captain Costanza testified that despite the emphasis on fitness, the employer does not require off duty exercise and does not require off duty trail run but the witness knows that applicant runs off duty and that applicant believes it is the best way to keep in shape for the job. (*Id.*, at 15, lines 8-9.) Captain Costanza reasonably "expects his employees to exercise off duty," as does he. (*Id.*, at 14, line 13-16, line 5.)

MOFD's Physical Fitness Exercise Policy ("Fitness Policy") gives all firefighters 180 minutes per shift (90 minutes per day on a regularly scheduled two-day shift) of compensated time to exercise using employer purchased fitness equipment in a designated gym space to maintain physical fitness. The exercise policy does not specifically exclude any exercise activities. (Applicant's Exhibit 1). While the policy directed that calls for service take priority over exercise time, Captain Costanza testified that firefighters under his command can use that compensated on-shift time to exercise on about 99 percent of their shift days. (MOH/SOE at 15, lines 12-14). Applicant testified that off-duty personnel may access the MOFD provided gyms and exercise equipment and that he did not use the MOFD provided exercise facilities while off-shift. (*Id.* at 6, lines 22-25). There is a challenge board at some MOFD stations that shows the fitness levels of some MOFD employees. (*Id.* at 7, lines 20-21).

At trial, the applicant presented the testimony of Daniel Elbanna who has been employed by the employer for over fifteen years and is currently a captain. (MOH/SOE at 16, lines 7-8.) Captain Elbanna worked with applicant for approximately one year in 2021 to 2022. (*Id.*, at 17, lines 14-15.) Captain Elbanna testified that he injured his right knee working out at a cross-fit gym when he was off duty in 2018 and he had knee surgery in 2019. (*Id.*, at 16, lines 8-12.) He did not file a workers' compensation claim at the time of injury. Rather, when he needed surgery, he filed a claim in the direction of Christine Russell in human resources and the claim was accepted. (*Id.*, at 16, lines 9-12 and lines 23-24.) The paperwork for his claim stated injury occurred at the private gym. (*Id.*, at 16, line 13.)

The adjuster from Athens told the Captain Elbanna that it is expected of firefighters to maintain physical shape for performance and injuries sustained outside of work, such as gym, are covered except for extreme activity such as "adrenaline high rush activities." (*Id.*, at 17, lines 2-6.) Captain Elbanna, a sociable co-worker, had "an enjoyable time" with workers' compensation and shared his experience with other co-workers, including applicant. (*Id.*, at 17, lines 8-13.)

III. APPLICABLE LAW

Applicant's claim is denied under Labor Code section 3600(a)(9) which provides:

> 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.

Defendant contends that case law has reliably established that Labor Code §3600(a)(9) applies to bar Applicant's claimed injury, and every case interpreting the off-duty injury of a public safety employee has emphasized the *employer's* actions *specific* to the activity performed *at the time of injury*. Defendant contends that the employer that provides ample compensated time opportunity to its employees to maintain physical fitness while on-shift and on employer premises and so it should not be liable for applicant's injury sustained running on a mountain when he was off duty. Defendant points out that applicant bears the burden of proof in this denied case.

Applicant contends that injury is compensable despite the "off-duty activity exception" in subdivision (a)(9) of Section 3600, which either was never meant to apply to injuries that arose out of physical training that are necessary to perform the job and necessarily requires exercise during and outside of work hours, or there is an exception to section 3600(a)(9) based on *Ezzy v. Workers' Comp. Appeal Boa*rd (1983) 146 Cal.App.3d 252, which carves an exception and requires determination of "whether the employee subjectively believes his or her *participation in an activity* is *expected* by the employer, and whether that belief is objectively reasonable." (*Id.* at 260, emphasis added).

Defendant contended that Applicant's framing misunderstood Ezzy's holding and inquiry because *Ezzy* and subsequent binding and persuasive case law establish that the pertinent inquiry is "whether the employee subjectively believes his or her *participation in an activity* is *expected* by the employer, and whether that belief is objectively reasonable." (*Id.* at 260, emphasis added). Defendant contends that this is the case of the general need to maintain fitness which is insufficient to bring an off-duty injury into the workers' compensation arena.

A. Physical Fitness is Necessary for the Job, But MOFD Has No Required Activities for Physical Fitness

Applicant contends that injury is compensable despite the "off-duty activity exception" in subdivision (a)(9) of Section 3600. Though it is clear that physical fitness is required of the firefighters including applicant, yet once a firefighter is hired, there is no set standard for physical fitness. Defendant argues that ample time is provided during a shift for fitness and maybe this is true for some, but not for applicant and not according to Captain Costanza. There is an unwritten expectation as expressed by Captain Costanza that applicant and the others on the unit must exercise independently off duty. In addition, the department-wide "challenge board" setting a high bar for fitness reinforces the culture and underscores the expectation of off duty workouts. Yet, fitness varies by individual. Because the employer has no set standard of fitness after hire, no ongoing physical fitness tests, and no prescribed activity, but instead leaves it up to the individual, additional inquiry is required.

B. Under Ezzy and Based on the Evidence, Applicant's Injury Occurring within the Course and Scope of His Routine Off-Duty Work Out and Is Compensable

Defendant contends that cases as applied to a public safety employee emphasize that the *employer's* actions *specific* to the activity performed *at the time of injury*. Here, Captain Costanza expressed it clearly: it is expected that firefighters work out while off-duty to maintain their fitness for duty. The culture of physical fitness is underscored by the department-wide "challenge board." By the time of his injury, everyone knew that applicant's personal off duty workout routine included trail running. Clearly, trails running on terrain such as Mount Burdell mimics the job of fighting wildland fires and helps applicant maintain his fitness for duty.

The fact that the Dipsea Race was close in time and even if applicant was training for this race or any other on rugged terrain race does not diminish the fact that the employer derives a direct benefit from applicant's fitness and his fitness reflects positively to the public at large. It is well known in the station and therefore by the employer that trail running is an integral part of applicant's off-duty fitness regime along with working out in a private gym.

Furthermore, the employer took action to instruct Captain Elbanna to file for workers' compensation when he needed knee surgery stemming from an off-duty gym injury. The paperwork referenced the gym injury as the injurious exposure. Defendant accepted Captain Elbanna's claim for off duty injury when he needed surgery, one year after the injury occurred, despite a potential statute of limitations barring unreported injuries after one year. The actions of the claims administrator to accept Captain Elbanna's off duty gym injury as compensable on the basis that fitness is an expectation of the job and injuries outside of work that happen at a gym are covered as distinguished from "adrenaline high rush activities" is important to establish the conduct of both the employer and the adjusting entity and therefore, applicant's expectations.

Defendant cites various cases applying the *Ezzy* standard to deny compensability of off duty injuries sustained by public safety employees. In *Taylor v. WCAB* (1988) 199 CA3d 211, the Court of Appeal held that an injury sustained by police officer while playing in a "pick up" basketball game on City premises while on his lunch hour was non-compensable. It was undisputed that the employer expected that Applicant to maintain physical fitness "[a]s a police officer, petitioner was expected (by his employer) to keep himself in good physical condition, particularly as a member of the hostage negotiating team (HNT)." The Department instituted a policy that certain off-duty athletic activities were a part of employment. The basketball game that caused

Applicant's injury was not included in any such list. (*Id.* at 214). Applicant in Taylor testified that his role in hostage negotiations required a higher physical fitness standard than other police officers, that he played basketball to maintain and improve his physical fitness for that job to the employer's benefit. (*Id.* at 215). The Court of Appeal held that Applicant's injury was not compensable because it was "sustained while voluntarily participating in an off-duty athletic activity… and that "[p]etitioner conceded that his employer did not require him to participate in the basketball game." (*Id.* at 215). Further, Applicant knew that pickup basketball was not on the approved activity list for workers' compensation coverage.

Defendant contends that *City of Stockton v. WCAB (Jenneiahn)* (2006) 135 CA4th 1513 is relevant as it involved a police officer's injury sustained in an off-duty basketball game. The City implemented a rule that all police officers were required to maintain good physical condition, but it did not provide time to exercise while on duty or compensate the employees for exercise time. (*Id.*, at 1517). The injury occurred during an off-duty game at a private facility. The *Jenneiahn* court framed that the compensability inquiry must focus "on the specific activity in which the employee was involved when the injury occurred." (*Id.*, at 1524). The Court referenced the need for substantial nexus between "an employer's expectations or requirements and the specific off-duty activity in which the employee was engaged…." (*Id.*, at 1524). General fitness assertions, the Court of Appeal stated, are not sufficient, and the pertinent inquiry is whether the "employer expected the employee to participate in the specific activity in which the employee was engaged at the time of the injury." (*Id.*, at 1524). The Court of Appeal declined to find injury AOE/COE based on (1) Officer Jenneiahn's specific knowledge that he was not subject to a physical fitness examination, (2) his knowledge that he was not subject to discipline for failure to maintain fitness, and (3) his testimony that he maintained fitness regardless of basketball games, to support that Applicant's subjective belief did not meet the objective reasonableness component of the *Ezzy* test.

Defendant also cites *Williams v. City of Folsom* (2021) 86 CCC 235, 48 CWCR 190.[1] In *Williams*, the Appeals Board overturned a Workers' Compensation Administrative Law Judge and held that Labor Code §3600(a)(9) barred a firefighter's injury sustained while participating in off-duty CrossFit. In *Williams* the applicant testified that (1) he worked out to maintain the physical demands of firefighting, and (2) he was told in his prior training that working out was necessary

[1] Defendant notes that an available trial and appellate record in Williams included a detailed Decision after Reconsideration, available at Williams v. City of Folsom 2020 Cal. Wrk. Comp. P.D. Lexis 291.

to meeting his physical job demands. The employer in Williams required a yearly fitness examination that included running, gripping, sit-ups, push-ups, and a mobility test. Applicant testified that he exercised while off duty to improve his fitness as a firefighter and to prepare for the employer's fitness test, which he believed that he could not pass without outside exercise. Apparently, the injured worker also testified that some of the workout equipment at his station was dilapidated and very damaged.

Petitioner contends that based on the *Ezzy* cases pertaining to public safety employees the injury at hand is not compensable because (1) Defendant MOFD did not require that he perform physical fitness testing, either as a condition of his employment or otherwise, a factor cited in *Taylor*, *Jenneiahn*, and *Williams*; (2) at the time that applicant chose to trail run off- duty, he was not training for any employer mandated test, promotion opportunity, or specialty team, a factor in Taylor; (3) Defendant MOFD and/or his superiors did not specifically encourage him to trail run, a factor in Ezzy, Jenneiahn, and Williams; (4) Defendant MOFD provided 90 minutes per shift-day of compensated time to exercise to maintain fitness, a factor cited in the Williams case; and (5) Defendant MOFD provided exercise equipment in a controlled workout room to exercise for fitness.

Applicant's case is distinguishable. Here, applicant testified to his subjective belief that the employer expects him to exercise outside of work hours. The trial took place in person and the applicant was very credible. His testimony was unrebutted. Specifically, applicant's training and experience resulted in his annual ramp up to prepare for each fire season by trail running because it was required activity during his time with the US Forest Service and CalFire. Applicant described trail running as closely mimicking the environment a firefighter faces when fighting wildfire. He knows this because he has experience fighting wildfire.

In addition, applicant's belief concerning his employer's expectations is objectively reasonable considering the unrebutted testimony of Captain Costanza, the nature of the job, and that the captain expects his subordinates to maintain their fitness routines off duty.

Moreover, there is the testimony by Captain Elbanna who had an off-duty knee injury while performing his routine workout at a private gym which was processed and accepted one year after it occurred. Captain Elbanna did not file a workers' compensation claim at the time of injury but when he needed surgery, he was directed by human resources to file a claim. Captain Elbanna testified that the claims adjuster for Athens said that it is expected of firefighters to maintain

physical shape for performance and injuries sustained outside of work, such as gym, are covered except for extreme activity such as “adrenaline high rush activities.” The witness told everyone about his experience with workers’ compensation and how well he was treated. Captain Elbanna’s credible testimony was unrebutted. Defendant fails to explain or distinguish its handling of Captain Elbanna’s injury. Clearly, all parties including applicant had mutual knowledge of actions taken by the employer and adjusting entity in the late processing and acceptance the off-duty injury sustained by applicant’s co-worker as the result of his routine off-duty workout. In a union environment, a rank-and-file employee reasonably expects the same treatment by management as experienced by others in the unit. I see no basis for treating the applicant’s off-duty workout injury any differently from the way the Petitioner handled the off-duty workout injury sustained by applicant’s co-worker.

Based on all of the factors, the injury should be found AOE/COE.

IV. RECOMMENDATION

Based on the foregoing, it is recommended that the Petition for Reconsideration be **DENIED.**

Date: 06-17-2024

Therese Da Silva
WORKERS’ COMPENSATION
ADMINISTRATIVE LAW JUDGE