WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARK LIBMAN,

Applicant,

vs.

CITY OF INGLEWOOD,
Permissibly Self-Insured,

Defendants.

Case No. 88 LB 178664

OPINION AND ORDERS DENYING RECONSIDERATION, GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Both defendant, City of Inglewood, and lien claimant, Boehm and Associates (petitioner), seek reconsideration of the Findings and Order issued by a workers' compensation judge (WCJ) on May 22, 1991. In that decision, the WCJ found, in pertinent part, that applicant, a police officer, sustained cumulative injury to the heart from 1981 through May 24, 1988, which "presupposes a continuum of mini-traumas, albeit non-evidencing disabilities until the final occurrence" of his heart attack on May 24, 1988 when he was jogging off-duty preparing for a physical endurance test, and that the Labor Code section 3212.5[1] presumption applies.

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1 Labor Code section 3212.5 states, in pertinent part, as follows:

"In the case of a member of a police department of a city or municipality, . . . [t]he compensation which is awarded for such heart trouble or pneumonia shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits as provided by the provisions of this division.

"Such heart trouble or pneumonia so developing or manifesting itself shall be presumed to arise out of and in the course of the employment; provided, however, that the member of the police department, shall have served five years or more in such capacity before the presumption shall arise as to the compensability of heart trouble so developing or manifesting

The WCJ also ordered defendant to adjust petitioner's lien claim in the sum of $49,281.48 utilizing the Gregory formula (Kaiser Foundation Hosps. v. Workers' Comp. Appeals Bd. (Gregory) (1978) 87 CA 3d 336 [43 Cal.Comp.Cases 1300].)

Defendant contends, in essence, that applicant's heart attack while jogging off duty was not in the course of his employment because his belief that his jogging was a reasonable expectancy of his employment was not objectively reasonable. Petitioner contends (1) that its Petition for Reconsideration is timely; and (2) that where there is no legitimate dispute as to industrial causation, a Gregory formula may not be applied.

After reviewing the record, and for the reasons set forth below, we will grant defendant's Petition for Reconsideration, rescind the WCJ's decision and issue our substituted finding that applicant's injury did not arise out of and in the course of his employment. In view of our finding of no industrial injury, we will deny lien claimant's Petition for Reconsideration, and disallow its lien claim.

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itself. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

"Such heart trouble or pneumonia so developing or manifesting itself in such cases shall in no case be attributed to any disease existing prior to such development or manifestation."

...

The history of this case is that applicant, born July 20, 1959, experienced heart failure on May 24, 1988 while jogging off duty near his home. Applicant filed a workers' compensation claim on June 15, 1988, alleging that he sustained cumulative industrial injury to the cardiovascular system from 1981 through May 24, 1988. All regular issues were settled in the sum of $22,000.00 by way of Compromise and Release (C&R) agreement filed on April 24, 1990. The C&R agreement also contained the relevant following language:

> "Paragraph No. 6
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> " . . . The applicant is to be held harmless from any liens of record for self procured medical treatment."
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> "Paragraph No. 7
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> "All lien claims of record are to be taken off calendar with all due process rights reserved to said lien claimants in accordance with Permanent Medical Group v. WCAB (Williams) (1977) 73 Cal.App.3d 135, 42 Cal.Comp.Cases 745."
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> "Paragraph No. 10
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> "A substantial and legitimate dispute exists between the parties as to the nature and extent of the applicant's disability and whether said disability was caused, contributed to and/or aggravated by the applicant's employment with the City of Inglewood. However, the applicant desires a sum certain by way of settlement."

The Order Approving Compromise and Release (OAC&R) Agreement issued June 4, 1990.

On August 14, 1990, petitioner filed a Declaration of Readiness to Proceed on its lien claim, and the matter was set for

a pre-trial hearing on October 25, 1990, and later set for a regular hearing on March 1, 1991. At the hearing, the issues raised were injury arising out of and during the course of employment and the lien claim of Blue Shield of California in the sum of $49,281.48, represented by petitioner. No testimony was taken, but the deposition of applicant of September 15, 1988 was taken into evidence as a joint exhibit. The parties were advised to submit their respective trial briefs no later than April 1, 1991, and thereafter the matter stood submitted on the record.

A review of applicant's September 15, 1988 deposition reveals that applicant was a police officer employed by the City of Inglewood. He had been employed in this capacity for a number of years (12:19-25), and was a member of the "metro-team" which was responsible for city-wide patrol (14:12-24) and combating "major crime violators" and "street narcotic activity" (15:3-4).

Although applicant had been jogging since 1972 or 1973 (34:21-24; 36:18-20), applicant increased the exercise program because the police department instituted a physical agility test, which was to be taken by police officers belonging to the "metro unit" every six months (36:21-25; 37:1-9). Applicant, however, was not required by departmental policies to exercise on off-duty hours (38:2-9; 39:1-6). On May 24, 1988, while jogging off-duty, applicant had a heart attack (26:12-4; 27:1).

According to applicant's testimony, he had a heart attack while jogging off-duty in preparation for a physical agility test implemented by the police department. Applicant ran to stay in

condition, although he had not been specifically directed to do so by his supervisors or by departmental policies.

Based on the facts of this case, and for the reasons set forth below, we are persuaded that the WCJ erred in finding that applicant's injury arose out of and in the course of his employment.

Pursuant to subdivision (a)(9) of Labor Code section 3600, an injury is not compensable where the 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 reasonably expectancy of, or are expressly or impliedly required by, the employment . . . ."

Nothing in the record persuades us that applicant's off-duty jogging program was a reasonable expectancy of, or was expressly or impliedly required by his employment. The fact that the department implemented a physical agility test does not render applicant's off-duty, self-selected, voluntary and unregulated exercise regiment either a requirement or a reasonable expectancy of his employment. Similarly, the fact that applicant's supervisors may have approved of applicant's off-duty exercising does not amount to sufficient encouragement to make his off-duty jogging a reasonable expectancy of his employment.

In City of Los Angeles v. Workers' Comp. Appeals Bd. (Noetzel) (1979) 91 Cal.App.3d 759 [44 Cal.Comp.Cases 421], a police officer's injury was held to be not compensable because it occurred during a voluntary and unregulated training program engaged in by the officer at home in preparation for a fitness test. While the

injury in the case occurred prior to the date the subdivision (a)(9) of Labor Code section 3600 became effective, we think the Court's analysis of the issue remains valid, and is applicable to the present case:

> "Although the police department required Noetzel to take a physical agility test, there was no requirement that he prepare for it in any particular way or at all. The activity was not on the employer's premises, or under the employer's control, nor was there any benefit to the employer except to the extent that this particular individual might improve his proficiency.
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> "The Board's opinion contains the statement that Noetzel's superior officer was 'well aware of the weight-lifting program being undertaken at . . . home.' This is based upon Noetzel's testimony that his lieutenant had become aware of the weight-lifting through 'just normal talk.' There is no evidence that the department undertook to inquire into or regulate what Noetzel did at home. Under these circumstances the incidental knowledge of a supervisor is not a basis for finding that the home activity occurred in the course of employment.
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> "There is a wide variety of occupations in which it is necessary for the employee to maintain or improve physical or mental proficiency in order to continue employment or qualify for advancement. The variety of activities which might be thought to serve those purposes is infinite. When the self-improvement activity is voluntary, off the employer's premises and unregulated, the employer can have little knowledge of the physical risks involved, and no opportunity to minimize or protect the employee against such risks. These circumstances strongly militate in favor of classifying such activities as personal in the absence of some connection with employment other than hoped for personal improvement. The fact that the employer tested the fitness of the employee periodically should not by itself make a self-improvement an industrial activity." (Id., at 44 Cal.Comp.Cases 424-425.)

We will therefore grant defendant's Petition for Reconsideration, rescind the WCJ's decision and issue our substituted finding that applicant's injury did not arise out of and in the course of his employment. Insofar as we are finding that applicant's injury is non-industrial, lien claimant's petition will be denied, and its claim disallowed.

For the foregoing reasons,

IT IS ORDERED that lien claimant's Petition for Reconsideration filed June 11, 1991, be, and it hereby is, DENIED.

IT IS FURTHER ORDERED that defendant's Petition for Reconsideration filed June 14, 1991, be, and it hereby is, GRANTED, the May 22, 1991 Findings and Order, be, and it hereby is, RESCINDED and the following Findings and Order SUBSTITUTED therefor;

FINDING

1. Applicant's injury did not arise out of and in the course of his employment.

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LIBMAN

ORDER

IT IS ORDERED that the lien claim of Blue Shield of California in the sum of $49,281.48, be, and it hereby is DISALLOWED.

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY

I CONCUR,

I DISSENT (see attached dissenting Opinion).

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

AUG 8 - 1991

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD.

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DISSENTING OPINION

I DISSENT. I would have affirmed the finding that applicant sustained injury arising out of and in the course of his employment to his cardiovascular system, as a result of continuous trauma from 1981 to May 24, 1988, the date on which he sustained his heart attack. I am persuaded that Labor Code section 3212.5 is applicable. This presumption envisions that persons performing duties of law enforcement who develop heart trouble, such heart trouble is presumed to arise out of and in the course of the employment.

In the present case, applicant on his day off, was attempting to keep himself at a level of agility to insure his passing a physical test at work, which would insure that he maintain his employment with the "metro-unit." The fact that applicant was jogging, as a preferred personal means of exercising, does not overcome the presumption that applicant, a police officer, was facing a physical endurance test, and while preparing for it, he sustained a heart attack. Although, the Labor Code section 3212.5 presumption is rebuttable, defendant has presented no evidence which would rebut such presumption. The fact remains that applicant, a police officer, did suffer cardiac injury and the presumption, which has not been rebutted, applies.

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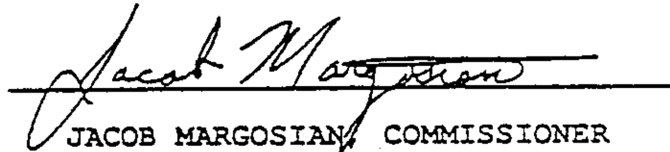
LIBMAN

1 Insofar as I would have found that applicant's injury arose
2 out of and in the course of his employment, I would have denied
3 defendant's petition and granted lien claimant's Petition for
4 Reconsideration and ordered that the lien claim of Blue Shield of
5 California be adjusted and/or pay by defendant.

6 WORKERS' COMPENSATION APPEALS BOARD



9 JACOB MARGOSIAN, COMMISSIONER

11 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

12 AUG 8 - 1991

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FORM 59.10