WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RANDALL SAMALOT (Deceased), LAUREN JOYCE (Wife), GENEVIEVE SAMALOT (Daughter), ***Applicants***

vs.

YARDI SYSTEMS; ONE BEACON INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ10754584
Santa Barbara District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Award of October 18, 2019, the workers' compensation judge ("WCJ") found that the injured employee, Randall Samalot ("decedent"), while employed as a project manager on September 21, 2016, sustained injury to his body arising out of and in the course of employment resulting in his death, that the decedent's death was caused by ingesting poppy seed tea and Kratom, which are immediate precursors to codeine and morphine as set forth in Health and Safety Code section 11007, with the latter two drugs listed as controlled substances under Health and Safety Code sections 110055(G) and 110055(L), and that defendant did not sustain its burden of proving the affirmative defenses of intoxication, suicide or material deviation. The WCJ also found that the applicants herein, Lauren Joyce and Genevieve Samalot are total dependents, who are entitled to death benefits pursuant to Labor Code sections 4702(a)(1) and 4703.5.

Defendant filed a timely Petition for Reconsideration of the WCJ's decision. Defendant contends that the WCJ erred in finding decedent's death to be industrial, that the WCJ erred in disallowing expert testimony, research, and expert reporting on the defenses of intoxication, material deviation and suicide, that the WCJ erred in not finding compensation for the decedent's death barred by the defense of intoxication under Labor Code section 3600(a)(4), that the WCJ erred in discounting the affirmative defense of material deviation and suicide without explanation

or development of the record, and that the WCJ erred in finding Lauren Joyce and Genevieve Samalot to be total dependents.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

The outward facts are not in dispute. As described by the WCJ in his Opinion on Decision, on September 21, 2016, applicant, a project manager, was in Anaheim working for his employer Yardi Systems, who was hosting a convention wherein Yardi intended to show their customers or potential customers Yardi's new software. In the WCJ's words, the decedent "was part of the team who would make that happen." The night before the convention was to start, the decedent was in his hotel room, which was provided by Yardi for his use during the convention, when the decedent prepared himself a tea made from soaking poppy seeds and "Kratom." The WCJ further states in his Opinion on Decision: "When poppy seeds are soaked in water they release a film. When the water with said film is ingested with Kratom the result is the body makes codeine, morphine and mitragynine. The parties stipulated that is what Mr. Samalot made, and that ingesting same caused his death." However, it appears that the WCJ's statement that the water with film, when ingested with Kratom, results in "the body mak[ing] codeine, morphine and mitragynine," may require clarification. The panel Qualified Medical Evaluator (PQME) in toxicology, Dr. Fischman, testified in his deposition that morphine and codeine are already present in the water or tea *before* it is ingested. (Exhibit K, pp. 7:12-8:3.)[1]

As noted at the outset, the WCJ found, on the facts described above, that the decedent, while employed as a project manager on September 21, 2016, sustained injury to his body arising out of and in the course of employment ("AOE/COE") resulting in his death. The extent of the WCJ's analysis of the AOE/COE issue, as set forth in his Opinion on Decision, is as follows: The decedent "would not have been in the hotel room where he died if he was not going to work the following morning for defendant at the convention. Based on this record [I] found the death to be AOE/COE."

However, based on our own review of the record and applicable law, we conclude that the record is incomplete and requires further development, and that the WCJ's analysis of the

[1] In his Opinion on Decision, the WCJ relies upon a report authored by Dr. Fischman dated September 28, 2018. The report is not in evidence because it was not among the exhibits admitted at trial on September 27, 2019. In further proceedings, the WCJ is directed to admit the report in evidence in EAMS, so as to make it readily available for the Appeals Board's review in any future proceedings in this matter. (See Lab. Code, § 5906.)

AOE/COE issue, and possible exceptions raised by defendant including "material deviation" and the intoxication defense of Labor Code section 3600(a)(4), is insufficient. Therefore, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings and new decision by the WCJ.

Preliminarily, however, we observe that some of defendant's contentions do not appear to have merit. For instance, we see no basis for admission of the medical evaluation procured by defendant and authored by Dr. Allems. The process for obtaining medical-legal evaluations is controlled by Labor Code sections 4060 and 4062.2. The petition for reconsideration fails to cite those statutes or to any other legal authority that would support admission of Dr. Allems's report. At trial, defendant relied upon Labor Code section 4605, but the statute is inapplicable in this context.

Similarly, we further observe that defendant's petition for reconsideration cites to no specific evidence that the decedent committed suicide. As such, defendant's allegation that Mr. Samalot may have committed suicide is based on mere speculation. In fact, defendant's failure to cite specific evidence of suicide in its petition for reconsideration violates WCAB Rule 10945, which states in relevant part, "[e]very petition for reconsideration … shall support its evidentiary statements by specific references to the record." (Cal. Code Regs., tit. 8, § 10945; see also, *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 923 (50 Cal.Comp.Cases 104) ["Instead of a fair and sincere effort to show that the trial court was wrong, appellants brief…is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness […]. An appellant is not permitted to evade or shift [its] responsibility in this manner."].) Accordingly, we will not indulge defendant's speculation that the decedent may have committed suicide, and to the extent the WCJ discounted the possibility, we perceive no error.

We also observe that towards the end of its petition for reconsideration, defendant raises Labor Code section 3600(a)(9), which bars compensation for injury that "arise[s] 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." However, defendant did not raise section 3600(a)(9) at trial, and a defendant may not raise an issue for the first time on reconsideration that it has not set forth in the record at trial. (See *James v. Workers' Comp. Appeals Bd.* (1997) 55 Cal.App.4th 1053 [62 Cal.Comp.Cases 757]; *Cuevas v. Workers' Comp. Appeals Bd.* (2005) 70

Cal.Comp.Cases 479 (writ den.); *L.A. Unif. School Dist. v. Workers' Comp. Appeals Bd.* (2001) 66 Cal.Comp.Cases 1220 (writ den.).)

The last of our preliminary observations is that it appears there is confusion in the record on the issue of dependency, which may just be invited error on the part of defendant. In its petition for reconsideration, defendant apparently concedes that Genevieve Samalot is a total dependent, yet defendant apparently takes issue with the WCJ's finding that Lauren Joyce Samalot is a total dependent. At trial on September 27, 2019, however, defendant stipulated that "there is no issue of dependency as to either Laura Joyce or Genevieve Samalot." With a stretch of the imagination, it is possible to read the stipulation as an attempt to defer the issue. A more straightforward reading of the stipulation is that defendant waived the issue. Of course, the WCJ allowed this ambiguous stipulation to be entered into the record. Given that we are rescinding the WCJ's decision and returning the matter to him for further proceedings and new decision on the other issues discussed in this opinion, we conclude that the WCJ should clarify and resolve the issue of dependency of both Laura Joyce and Genevieve Samalot.

We turn to the essential issue of "AOE/COE." In *Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, 1307-1308 (81 Cal.Comp.Cases 324), the Court of Appeal provided a helpful overview of the relevant legal principles:

> "The statutory requirement that the injury must have occurred "in the course of the employment" ordinarily refers to the time, place and circumstances under which the injury is sustained. (See *Griffin v. Industrial Acc. Com.* (1937) 19 Cal.App.2d 727, 732–733 [66 P.2d 176]; 1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed.) § 4.03, p. 4-36 (rel. 73-4/2011).) [In the *Guerra* case, there was] no question that [the injured employee's] death occurred while he was at work during work hours while wheeling an overflowing trash can on a dolly to the dumpster.
>
> "The term "arise out of the employment" means that the injury must be proximately caused by the employment. (1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation, supra, § 4.02[2], p. 4-16 (rel. 67-4/2008).) "'If the disability, although arising from a [preexisting nonindustrial condition], was brought on by any strain or excitement incident to the employment, the industrial liability still exists. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration.'" (*California etc. Exchange v. Ind. Acc. Com.* (1946) 76 Cal.App.2d 836, 840 [174 P.2d 680].)

In this case, in absence of a specific explanation from the WCJ, it appears he found the decedent's death occurred in the course of employment based upon the commercial traveler rule or the bunkhouse rule or the personal convenience and comfort rule. Whatever the case, it is nevertheless required that the employee's activity at the time of death must bear some relation to the purposes of the employment (as opposed to a "purely personal undertaking"); the same is true of the "AOE" requirement, i.e., the employment and the injury must be linked in some causal fashion. (See *Latourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].)

In the instant matter, defendant contends that when the decedent prepared and drank his fatally sedating tea in his hotel room, allegedly to relieve anxiety occasioned by the employer's convention, he "materially deviated" from the course of employment.[2] We express no final opinion on the merits of the contention, but we agree with defendant that the WCJ failed to address it in any meaningful way. As noted above, the WCJ simply found that because the decedent was found dead in his hotel room, provided by the employer so the decedent could work at the convention, he was in the course of employment. The finding begs the question of whether the decedent may have materially deviated from the course of employment. For instance, a personal drinking frolic in the vehicle of another person in rough terrain constituted a material deviation from a commercial traveler's duties and justified a finding that an injury sustained in a vehicle accident did not occur in the course of employment. (*Magnani v. Workers' Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 464 (writ den.).)

On the other hand, the circumstance that an employee may have been engaging in "immoral and unlawful" behavior at the time of death does not take the employee out of the course of employment. Thus in *Wiseman v. Industrial Acci. Com.* (1956) 46 Cal.2d 570 at 573, the Supreme Court stated: "The fact that the employee had a guest in his room while he was off duty in no way detracted from the fact that he was also there on his employer's business, and since the employee's fault is irrelevant if the requirements of the law are met, it is immaterial that the employee's personal purpose in having a guest in his room was immoral and unlawful." Similarly, a panel of

[2] Regarding the issue of work-related anxiety, we note there is evidence that the decedent apparently was planning to have anxiety at the convention. The Orange County Sheriff Coroner's report indicates that before the convention, Mr. Samalot mail-ordered bags of poppy seeds that he had delivered to his hotel room, and an investigating officer who interviewed Mr. Samalot's wife reported that she believed he was trying to hide his purchases of the poppy seeds and Kratom from her because she would not have approved, given his history of past alcohol abuse. (Trial exhibit 1, EAMS pp. 21-22.)

the Appeals Board stated in a recent case, "[a]n injured worker who is otherwise in the course of employment does not fall out of the course of employment even if he or she is performing his or her work in an unauthorized manner." (*Hansen v. Freight Handlers* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 141, citing *D. H. Smith Company, Inc. v. Workers' Comp. Appeals Bd.* (*Martinez*) (2009) 74 Cal.Comp.Cases 1278 (writ den.).) Further, where an employee dies under "mysterious circumstances," doubts are resolved in favor of the deceased employee. (*Kobayashi v. Dni Seafood Wholesaler & Sompo Int'l Ins. Co.* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 361. See also, *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.* (1977) 69 Cal.App.3d 170 (42 Cal.Comp.Cases 297) [death benefits upheld pursuant to personal comfort doctrine where decedent, a plant manager, was injured riding three-wheeled sports vehicle owned by the company president, during impliedly authorized break following vehicle repairs authorized by the president, but decedent's motivation in riding the vehicle was unknown]; *Mason v. Lake Dolores Group* (2004) 117 Cal.App.4th 822 [personal comfort doctrine inapplicable where injury sustained on water slide resulted solely from the employee's use for personal benefit, not condoned by the employer].)

Given the variability of case law on the AOE/COE issue, we conclude that the WCJ must revisit it in this case, and squarely address and resolve defendant's contention that the decedent "materially deviated" from the course of employment. Concerning the AOE issue, and although Dr. Fischman found the decedent's death to be industrial, we already noted that the employment and the injury must be linked in some causal fashion. Here, it appears that the causal "link" between the employment and the decedent's death is that he may have ingested the lethal tea to relieve his anxiety over performing well at the convention. However, the Summary of Evidence of the September 27, 2019 trial indicates there was conflicting testimony on this point. In essence, the decedent's widow testified that he was anxious about performing well at the convention, in which case there was a possibility of earning a promotion. However, the decedent's supervisor testified that she saw him just before the convention and she did not perceive him as being anxious, although apparently he had an upset stomach at the time. The WCJ did not address and resolve this conflict in the evidence about the causal link between the employment and the decedent's death, i.e., his alleged work-related anxiety. We conclude that he must do so in further proceedings at the trial level. Presumably, Dr. Fischman's report of September 28, 2018 would have a history

of injury that may shed further light on this issue, but as noted before the report is not yet in evidence.

Turning to the intoxication defense, Labor Code section 3600(a)(4) provides that one of the conditions for workers' compensation liability is where "the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee. As used in this paragraph, "controlled substance" shall have the same meaning as prescribed in Section 11007 of the Health and Safety Code."

We conclude that the WCJ erred in denying defendant the opportunity to present certain evidence relevant to the intoxication defense of section 3600(a)(4). The Minutes of Hearing of September 27, 2019 show that defendant attempted to call Mr. Devin Chase, an experienced former narcotics officer, to testify that "legal substances can be abused, [such] as sniffing glue, in a way to alter your mental state," with defendant apparently alleging that such abuse may constitute "unlawful use of a controlled substance" within the meaning of section 3600(a)(4). However, the WCJ disallowed Mr. Chase's testimony on grounds that it would be "an end around the toxicologist [Dr. Fischman]," and that Mr. Chase was "not there" in the decedent's hotel room to identify the liquid found in the cups there.[3]

We conclude the WCJ erred in disallowing Mr. Chase to testify at trial. In its petition for reconsideration, defendant asserts that Mr. Chase would "describe and explain how [through cold water extraction] seemingly innocent items in the decedent's hotel room [poppy seeds and Kratom] were illegally used to create the controlled substances Codeine and Morphine." (Petition for Reconsideration, p. 13:3-4.) As proffered, Mr. Chase's testimony is relevant to whether the decedent may have engaged in the "unlawful use of a controlled substance" within the meaning of section 3600(a)(4). The testimony concerns the issue of legality of making and using poppy seed tea from ostensibly legal ingredients to produce controlled substances, which appears to be within Mr. Chase's field of experience and expertise. Since Mr. Chase would not be testifying as a medical expert, the WCJ's reason for disallowing the testimony – that it would be an "end around" the medical opinion of Dr. Fischman - is invalid. We conclude Mr. Chase must be allowed to testify (and be subject to cross-examination) as an expert concerning whether or not "unlawful use

[3] It appears there is no dispute that the decedent made and ingested the lethal poppy seed tea in his hotel room. Therefore, the fact that Mr. Chase "was not there" is irrelevant; the issue is whether the creation and ingestion of the tea may have constituted "the unlawful use of a controlled substance."

of a controlled substance" may have occurred in this case.[4] (See Labor Code section 5708: [The Board "may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of" workers' compensation law.].)

For the same reason, the WCJ also must admit and consider defense exhibit S, consisting of "research regarding poppy seeds and Kratom." As with Mr. Chase's proffered testimony, it appears exhibit S may be relevant to the intoxication defense. Moreover, exhibit S should be admitted as a matter of fairness and due process, since the WCJ allowed applicants the admission of apparently similar information, i.e., copies of web pages about poppy seeds and their alleged nutritional and medicinal value. (Trial exhibits 3-6.) We further note that at trial, the WCJ excluded exhibit S as "not EAMS compliant." Of course, defendant must render exhibit S "EAMS compliant" to allow its admission in evidence. (*Hernandez v. AMS Staff Leasing* (2011) 76 Cal.Comp.Cases 343 [Significant Panel Decision].)

In summary, the evidentiary record is incomplete and requires further development as specified above, and the WCJ must revisit and resolve the AOE/COE issues with a complete and straightforward legal analysis. (See *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 (33 Cal.Comp.Cases 350, 351): [The WCJ's Opinion on Decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful."].)

Finally, we observe that this case presents difficult issues of compensability for defendant as well as the applicants. For this reason, we emphasize that no final opinion is expressed on any substantive issue herein. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided by Labor Code sections 5900 et seq.

[4] Defendant also alleges in its petition for reconsideration that the WCJ excluded a narrative report authored by Mr. Chase. However, the trial minutes do not show that defendant ever offered such a report or that the WCJ excluded it. In further proceedings at the trial level, the WCJ may consider whether defendant waived admission of any such report and if not, whether it should be admitted now. However, admission of a written report from Mr. Chase may be a moot point, in view of our conclusion that he must be allowed to testify with opportunity for cross-examination by applicants' attorney.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of October 18, 2019 is **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
March 24, 2022

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

RANDALL SAMALOT (DECEASED)
LAUREN JOYCE
GHITTERMAN, GHITTERMAN & FELD
LEWIS, BRISBOIS, BISGAARD & SMITH

JTL/ara

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