WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SOFIA SEVILLANO, *Applicant*

vs.

STATE OF CALIFORNIA, IHSS, LEGALLY UNINSURED; ADMINISTERED BY YORK RISK SERVICES GROUP, A SEDGWICK COMPANY, *Defendants*

Adjudication Number: ADJ13511723
San Bernardino District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration.[1] Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O) issued by a workers' compensation administrative law judge (WCJ) on August 5, 2021, wherein the WCJ found that applicant, while employed as a home healthcare worker on June 26, 2020, did not sustain injury arising out of and in the course of employment (AOE/COE). The WCJ found in pertinent part that applicant qualified for the presumption of industrial injury for COVID-19-related illness in Labor Code section 3212.86, but that defendant successfully rebutted the presumption.[2] The WCJ ordered that applicant take nothing.

Applicant contends that she qualified for the presumption in section 3212.86 and that defendant did not meet its burden to rebut the presumption.

We received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

---

[1] Commissioner Lowe, who was on the panel that granted reconsideration to study this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&O and substitute a new Findings & Award, and find that applicant qualifies for the presumption for COVID-19-related illness in section 3212.86; that defendant has not met its burden to rebut the presumption of section 3212.86; that applicant sustained injury in the form of COVID-19-related illness, and to her lungs in the form of pneumonia; and that the issue of injury to all other claimed body parts is deferred. We will also award further medical treatment reasonably required to cure or relieve from the effects of the injury.

FACTS

Applicant claimed injury in the form of COVID-19-related illness to the throat, loss of appetite, loss of taste, weakness, breathing, pneumonia, eyesight, hands, memory loss, headaches, loss of hair, psyche, neurological problems, and stress, while employed as a home health care worker by defendant State of California/IHSS (defendant) on June 26, 2020.

Applicant began working for defendant on May 5, 2020. (May 11, 2021 Minutes of Hearing and Summary of Evidence (MOH) at 4:7.) At the time of the alleged injury, applicant resided in a rented room in the home of Jose and Elizabeth Martinez. (*Id*. at 4:16.)

On June 26, 2020, applicant was providing home health services to Jose and Josefina Donado in their apartment in a retirement complex. (*Ibid.*) Applicant worked Monday through Friday and provided home health services such as taking the clients grocery shopping, cooking food, and other supportive services. (*Id*. at 4:25.)

On June 30, 2020, applicant was hospitalized at San Antonio Regional Hospital for eight days, with diagnoses of hypoxia, multifocal pneumonia, infection due to 2019 novel coronavirus, diffuse abdominal pain and diarrhea. (Ex. 9, records of San Antonio Regional Hospital, various dates, p. 71.) Applicant was not provided with a Spanish interpreter at the hospital. (MOH, at 4:12.)

On July 2, 2020, testing ordered under the supervision of attending physician Ali Etemadian, D.O., detected the COVID-19 virus. (Ex. 11, Records of San Antonio Regional Hospital, dated July 2, 2020, at p. 195.)

On July 6, 2020, applicant reported to her attending physicians that her "two roommates are also COVID positive, but she has her own room." (Ex. B, Records of San Antonio Regional Hospital, July 6, 2020, at p. 72.) Prior to her discharge on July 8, 2020, applicant requested that

the hospital social worker contact her landlord Mr. Martinez regarding arrangements for her return home. (*Id*. at p. 182.) Mr. Lopez offered living quarters in a converted garage, noting his wife was recently ill and that Mr. Lopez was afraid of contracting COVID-19 as he was already ill. (*Ibid.*)

On August 19, 2020, Ronald Zlotolow, M.D., evaluated applicant and issued an initial one-page assessment, finding applicant temporarily totally disabled. (Ex. 1, Report of Ronald Zlotolow, M.D., dated August 19, 2020, at p. 1.) Dr. Zlotolow diagnosed COVID-19, headache, breathing abnormalities and chest pain. (Ex. 2, Doctor's First Report, dated August 31, 2002, at p.3.)

On September 2, 2020, defendant denied liability for the claim. (Ex. A, Denial of Claim Letter, dated September 2, 2020, at p. 1.)

On September 8, 2020, Dr. Zlotolow issued his first narrative report, wherein applicant reported that the couple she worked for had both been diagnosed with COVID-19 and were still hospitalized. (Ex. 3, Report of Ronald Zlotolow, M.D., dated September 8, 2020, at p. 2.) Applicant also reported that the couple from whom she rented a room had tested negative for COVID-19. (*Ibid.*)

On October 5, 2020, Isaac Regev, M.D., evaluated applicant in neurology, noting complaints of headaches and dizziness, as well as chest discomfort and shortness of breath. (Ex. 8, Report of Isaac Regev, M.D., dated October 5, 2020, at p. 1.) Dr. Regev concluded there was no need for neurological treatment, and deferred any permanent disability rating to the internal medicine evaluation. (*Id*. at p.4.)

On November 19, 2020, Dr. Zlotolow issued another narrative report, noting that applicant's lab work was positive for COVID-19 antibodies. (Ex. 5, Report of Ronald Zlotolow, M.D., dated November 19, 2020, at p. 2.)

On January 28, 2021, Dr. Zlotolow found applicant permanent and stationary, and observed that applicant's home health employment brought her into contact with a married couple who had both tested positive for COVID-19 just prior to applicant testing positive. (Ex. 7, Report of Ronald Zlotolow, M.D., dated January 28, 2021, at p. 3.) Applicant was noted to rent a room from a different married couple, and the couple with whom she lived had both tested negative for COVID-19. Dr. Zlotolow concluded that applicant "acquired the [COVID-19] virus from her work as a caretaker, as her other contract [*sic*] tracing does not appear to provide a source of where she was exposed to the COVID-19." *(Ibid.)*

On May 11, 2021, the parties proceeded to trial, on the issues of injury AOE/COE, body parts injured, the applicability of the presumption of section 3212.86, and if applicable, whether defendant had rebutted the presumption. Applicant further raised the issue of timely denial, and defendant raised the issue of whether it had been served with a positive COVID-19 test. (MOH, at 2:17.) Applicant testified that the married couple for whom she worked had both tested positive for COVID-19, whereas the couple from whom she rented a room had not. (*Id*. at 4:18.) Applicant denied that her roommates had ever contracted COVID. (*Id*. at 5:17.) However, under cross-examination, applicant denied ever having asked her employers whether they tested positive for COVID-19. (*Id*. at 5:19.) Applicant described the health problems experienced by the married couple she worked for, and also the health challenges faced by the couple from whom she rented a room. (*Id*. at 7:1.) Applicant further testified that after she was released from the hospital, she did not live inside the house where she was renting a room, but instead was required to stay in the garage, as her roommates feared "getting the illness." (*Id*. at 7:13.)

On August 5, 2021, the WCJ issued the F&O, finding in pertinent part that the presumption of section 3212.86 applied but that defendant had successfully rebutted the presumption, and ordering that applicant take nothing by reason of her application. In the Opinion on Decision, the WCJ observed that applicant's trial testimony was internally inconsistent, and conflicted with the records from San Antonio Regional Hospital, and also with her reported medical history to Dr. Zlotolow. (August 3, 2021 Opinion on Decision, at pp. 7-9.) The WCJ noted specifically that applicant's testimony as to whether the married couple she worked for had tested positive for COVID-19 was inconsistent, as was applicant's testimony regarding her roommates' COVID status. (*Ibid.*) The WCJ assessed applicant's trial testimony as not credible, and further determined that the reporting of Dr. Zlotolow was not substantial evidence. (*Id*. at p. 9.)

DISCUSSION

Labor Code sections 3212 through 3213 contain a series of statutory presumptions regarding the industrial nature of various injuries applicable to certain law enforcement personnel, specified first responders, or other critical workers. "Generally, the provisions rebuttably presume an industrial causation between various injuries and diseases—such as hernia, heart trouble, pneumonia, cancer, tuberculosis, meningitis, or Lyme disease—sustained by the enumerated classes of public safety officers while or within a specified period of time so employed."

(*California Dep't of Corrections & Rehabilitation v. Workers' Compensation Appeals Bd. (Garza)* (2009) 74 Cal.Comp.Cases 134, 138 [2009 Cal. Wrk. Comp. LEXIS 18].)

The legislative intent behind the enactment of these presumption statutes was to "provide additional compensation benefits to employees who provide vital and hazardous services by easing their burden of proof of industrial causation." (*City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 310-311 [70 Cal.Comp.Cases 109], citing *Zipton v. Workers' Comp. Appeals Bd.* (1990) 218 Cal.App.3d 980, 988, fn. 4 [55 Cal.Comp.Cases 78], and *Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd. (Smith)* (1994) 23 Cal.App.4th 1120, 1123-1124 [59 Cal.Comp.Cases 180].)

Section 3212.86 was enacted pursuant to Senate Bill 1159 as urgency legislation on September 17, 2020, and provides in pertinent part:

> (a) This section applies to any employee with a COVID-19-related illness.
> (b) The term "injury," as used in this division, includes illness or death resulting from COVID-19 if both of the following circumstances apply:
>
> (1) The employee has tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction.
>
> (2) The day referenced in paragraph (1) on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after March 19, 2020, and on or before July 5, 2020. The date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction.
>
> (3) If paragraph (1) is satisfied through a diagnosis of COVID-19, the diagnosis was done by a licensed physician and surgeon holding an M.D. or D.O. degree or state licensed physician assistant or nurse practitioner, acting under the review or supervision of a physician and surgeon pursuant to standardized procedures or protocols within their lawfully authorized scope of practice, and that diagnosis is confirmed by testing or by a COVID-19 serologic test within 30 days of the date of the diagnosis.
>
> (c) The compensation that is awarded for injury pursuant to this section shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.
>
> * * *
>
> (e) An injury described in subdivision (b) is presumed to arise out of and in the course of the employment. This presumption is disputable and may be

> controverted by other evidence. Unless controverted, the appeals board is bound to find in accordance with the presumption.

Here, the WCJ found the presumption of section 3212.86 applicable. (Opinion on Decision, at p. 4.) The WCJ explained that applicant's last day performing services for the employer was within the time period described in subdivision (b)(2), and that the aggregate medical records from San Antonio Regional Hospital satisfied the "positive test" requirement of subdivision (b)(1). Thus, applicant's COVID-19 related illness was presumed to have arisen out of and in the course of her employment. (Lab. Code, § 3212.86(e).) We concur with the WCJ's analysis in this regard.

However, pursuant to subdivision (e), the presumption may be controverted by "other evidence." (Lab. Code, § 3212.86(e).) The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact. (Evid. Code, § 606; *City of Long Beach v. Workers' Compensation Appeals Bd. (Garcia*), *supra*, 126 Cal.App.4th 298, 314.) Accordingly, once the "facts giving rise to the presumption of industrial injury have been proven at the outset, the burden of proof negating the presumption falls upon the employer." (*Gillette v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 312 [36 Cal.Comp.Cases 570].) It thus falls to *defendant* to establish that applicant's COVID-19 related illness did not arise out of and in the course of her employment.

Here, we are not persuaded that defendant has met this burden. Defendant offers no substantial evidence that applicant was infected with the COVID-19 virus elsewhere. Defendant offers no treatment reports or medical-legal reporting ascribing applicant's illness to nonindustrial factors. Defendant offers no witness testimony addressing collateral sources of COVID exposure. Other than applicant's self-reporting, there is no documentary or testimonial evidence regarding whether applicant's employer or her roommates were COVID positive.

We acknowledge that the records of San Antonio Regional Hospital mention applicant reporting that her roommates "are also COVID positive." (Ex. B, Subpoenaed records, designated portions, from San Antonio Regional Hospital, at p. 72.) However, applicant denied stating this to the hospital staff in her trial testimony, and also noted she did not have an interpreter at the hospital. (MOH, 4:12.) There is no corroborating evidence on this issue elsewhere in the record. The defendant's affirmative burden of rebutting the presumption of industrial causation requires more than a passing reference in chart notes to a statement made without the benefit of an interpreter, one that is otherwise unsubstantiated in the record.

Accordingly, we find that defendant has not offered substantial evidence that applicant acquired the virus outside of her employment exposure, and has therefore not successfully rebutted the presumption of injury.

We further acknowledge that the WCJ found applicant's testimony not credible, given the inconsistencies between applicant's trial testimony and her statements contained in the medical reporting. (Report, at pp. 7-8.) While we generally accord great weight to the credibility findings of a WCJ since the WCJ has the opportunity to observe the demeanor of witnesses and weigh their statements in connection with their manner on the stand (*Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3rd 312 [35 Cal.Comp.Cases 500]), the relevance of the WCJ's credibility determination is attenuated by operation of the presumption statute, which serves to ease applicant's burden of proof of industrial causation. (*City of Long Beach (Garcia)*, *supra*, 126 Cal.App.4th 298.) Here, applicant qualifies for the presumption of section 3212.86, and the affirmative burden now rests with the defendant to disprove that the injury arose out of and in the course of employment. On the record before us, we are persuaded that the presumption of injury is applicable based on undisputed facts unrelated to applicant's testimony, and that defendant has not affirmatively rebutted that presumption.

Additionally, the WCJ determined there was no evidence of injury to any body parts. She concluded that the reporting of applicant's primary treating physician Ronald Zlotolow, M.D., did not constitute substantial medical evidence, as the physician reviewed no records, relied solely on applicant's history, and conducted a limited examination of applicant. (Opinion on Decision, at p. 9.) However, we also observe that the records of San Antonio Regional Hospital provided multiple diagnoses during applicant's hospitalization in July, 2020. Applicant's chart notes indicate diagnoses of acute hypoxic respiratory failure, COVID-19, hypoxia and community-acquired pneumonia. (Ex. B, Subpoenaed records, designated portions from San Antonio Regional Hospital, at p. 115.) Dr. Etemadian released applicant from in-patient care to self-quarantine on July 8, 2020. (Ex. 9, Subpoenaed records, designated portions from San Antonio Regional Hospital, at p. 73.) The discharge diagnoses included hypoxia, multifocal pneumonia, and infection due to 2019 novel coronavirus. (*Ibid.*) Applicant also reported respiratory symptoms in her initial evaluation with Dr. Zlotolow, and with Dr. Regev. (Ex. 3, Report of Ronald Zlotolow, M.D., dated September 8, 2020 at p. 2; Ex. 8, report of Isaac Regev, M.D., dated October 5, 2020, at p. 1.) We find applicant's uniform complaints of shortness of breath, subsequent eight day hospitalization,

and the diagnosis established by Dr. Etemadian sufficient to determine that applicant sustained COVID-19-related illness, including injury to the lungs in the form of pneumonia. We will defer findings relating to all other body parts.

Accordingly, we will rescind the F&O and substitute findings of fact that applicant qualifies for the presumption for COVID-19-related illness in section 3212.86; that defendant has not met its burden to rebut the presumption of section 3212.86; that applicant sustained injury in the form of COVID-19-related illness, and to her lungs in the form of pneumonia; and that the issue of injury to all other claimed body parts is deferred. We will further award medical treatment reasonably required to cure or relieve from the effects of the injury.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of August 5, 2021 is **RESCINDED,** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Sofia Sevillano, while employed as a home healthcare worker at Upland, California, on June 26, 2020 by the State of California, IHSS, legally uninsured as to workers' compensation liability administered by York Risk Services, a Sedgwick Company, claims to have sustained injury arising out of and occurring in the course of her employment in the form of Covid-19, including but not limited to her throat, loss of appetite, loss of taste, weakness, breathing, pneumonia, eyesight, hands, memory loss, headaches, loss of hair, psyche, neurological problems and stress.
2. Defendant issued a timely denial.
3. Defendant was served medical reporting reflecting applicant's diagnosis of COVID-19 and serology test results in the subpoenaed records of San Antonio Regional Hospital.
4. Defendant was not served a copy of a separate positive COVID-19 Test report.
5. Applicant qualifies for the presumption for COVID-19-related illness as set forth in Labor Code section 3212.86.
6. Defendant has not met its burden to rebut the presumption of Labor Code section 3212.86.
7. Applicant sustained injury arising out of and in the course of employment in the form of COVID-19-related illness, and to her lungs in the form of pneumonia.

8. All other claimed body parts are deferred.

AWARD

a. All further medical treatment reasonably required to cure or relieve from the effects of the injury herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 28, 2022

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

SOFIA SEVILLANO
THE DOMINGUEZ FIRM
LAW OFFICES OF BRADFORD & BARTHEL

SAR/abs

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