

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

MARIO MORALES, *Applicant*

vs.

**ANCON MARINE and ZURICH AMERICAN INSURANCE COMPANY,
*Defendants***

Adjudication Number: ADJ11399411

San Diego District Office

**OPINION AND DECISION
AFTER
RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration¹ (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings, Award and Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on October 17, 2022, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his face, mouth, jaw, and neck in the form of squamous cell cancer and subsequent lung cancer.

Defendant contends that the reports from internal medicine qualified medical examiner (QME) Stewart A. Lonky, M.D., are not substantial evidence; that applicant needs to be evaluated by a regular physician expert in toxicology; and that applicant did not meet his burden of proof regarding injury AOE/COE, so the burden of proof as to causation did not shift to defendant.²

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which

¹ Following the grant of reconsideration, Commissioner Dodd became unavailable. Another commissioner was assigned in her place.

² We note that "assertions and arguments" made in previous pleadings but that are not actually made in the Petition, are not "incorporated" and are not considered. (Petition, p. 12.)

we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will affirm the F&A.

BACKGROUND

Applicant claimed injury to his face, mouth, jaw, neck, psyche, gastrointestinal system, skin, and in the form of squamous cell cancer, and lung cancer while employed by defendant as a diesel truck mechanic during the period from September 1, 2008, through April 1, 2017.

QME Dr. Lonky evaluated applicant on December 7, 2018. (Joint Exh. U, Stewart A. Lonky, M.D., December 7, 2018.) Dr. Lonky examined applicant, took a history, and reviewed the extensive medical record (See Joint Exh. U, pp. 6 – 60). The doctor also reviewed various material safety data sheets (See Joint Exh. U, pp. 61 – 66).³ The diagnoses included:

1. History of exposure to significant number of carcinogenic compounds, heavy metals, fumes, and dusts throughout the course of his employment.
2. Development of squamous cell cancer of the alveolar ridge on the right with local bone metastases.
3. Metastatic disease to the right lung status post resection.
4. Status post multiple surgical procedures for reconstruction of the right jaw with skin grafts and bone grafts. ...

(Joint Exh. U, p. 66.)

Regarding the cause of applicant's condition, Dr. Lonky explained:

I have had the opportunity to evaluate Mr. Morales in my role as a Panel Qualified Medical Evaluator in internal medicine and pulmonary medicine. With my strong background in toxicology, I have reviewed over two thousand pages of material safety data sheets, and I am not surprised that the number of different compounds that this gentleman worked with during the course of his employment with Ancon as a "tank cleaner." ¶ ... Given all of these scientific data, it is my opinion that it is reasonably medically probable in this nonsmoking and nonalcohol consuming gentleman who does not chew beetle nut, and has no other reasons to develop oral cancer, that his chronic exposures to multiple carcinogens in very closed space, with both deposition on the oral mucosa and probable ingestion of these carcinogens taking place that there is a causal relationship between his workplace exposures and his development of squamous cell cancer of the oral cavity with its metastases.

(Joint Exh. U, pp. 67 - 69.)

³ Material Safety Data Sheets list the hazardous ingredients of a product, its physical and chemical characteristics (e.g. flammability, explosive properties), its effect on human health, the chemicals with which it can adversely react, handling precautions, the types of measures that can be used to control exposure and ensure safety. (Merriam-Webster Medical Dictionary.)

On January 18, 2020, Dr. Lonky re-evaluated applicant. (Joint Exh. V, Stewart A. Lonky, M.D., January 18, 2020.) After re-examining applicant, taking an interim history and reviewing additional medical records (Joint Exh. V, pp. 9 – 46), he stated:

I continue to feel that, as described in my initial report on this gentleman, that his exposures to various hydrocarbons, heavy metals, and even small amounts of radium, contained in some of the chemicals that he was exposed to in close quarters in the inside of the tankers that he cleaned, there was sufficient exposure to account for a[n] "acceleration" of oropharyngeal cancer. ¶ ... Given all of this information, I continue to feel that from a "causation" standpoint, Mr. Morales' exposures to these chemical agents were the significant factors contributing to the development of cancer of the oropharynx, particularly in this gentleman who is a nonsmoker and a minimal, if at all, alcohol consumer. (Joint Exh. V, p. 49.)

The parties proceeded to trial on October 20, 2020. The matter was continued various times and at the October 26, 2021 trial the WCJ concluded:

After hearing testimony from the various witnesses and examining the documents submitted by the parties, the WCJ is of the opinion that the Qualified Medical Examiner, Dr. Lonky [sic], has submitted a report that does not qualify as substantial evidence. The history as obtained by Dr. Lonky [sic] is so different from the facts and evidence presented at trial as to render the doctor's report not substantial evidence; therefore, the QME, Dr. Lonky [sic], shall be provided with sufficient facts by the parties as developed at trial so that he may render an opinion based upon the actual facts of this case. The parties may utilize the Minutes of Hearing and Summary of Evidence or obtain a trial transcript and submit it to the doctor as needed and request further information regarding his opinion on causation. The matter shall remain off calendar pending receipt of an updated report from the QME based upon his understanding of the facts surrounding this injury as presented to the trial judge. ... (Minutes of Hearing and Summary of Evidence (MOH/SOE) October 26, 2021, pp. 7 - 8.)

After reviewing the additional records he was provided, in his supplemental report Dr. Lonky stated:

... I recognize that there are a lot of moving parts in this case and that, in no case, were any of the exposures massive. However, whether or not he spent 30 percent or 40 percent of his time inside the truck exposed to these particles and potential fumes, and whether or not he lifted his mask off for periods because of perspiration and discomfort, these are all parts of the issue at hand. In other words, this gentleman worked for several years two to three times per week for anywhere from one to four hours at a time with these repeated exposures. Small

amounts of exposure can result in the accumulation of carcinogens in sensitive tissue. It is highly unusual to see a patient with oral cavity cancer who is not a drinker and not a smoker. A perusal of World Literature will show that the vast majority, probably well over 80 percent of cases, have this as a background in patients who succumb to this disease. Finding a patient who is neither a smoker nor a drinker and who has developed alveolar ridge squamous cell cancer demands that the clinician looks for an external or environmental agent which could have caused these problems. Given this gentleman's job description and the fact that, although the best intentions of the employer were that these subjects be protected, the history from Mr. Morales was that the mask was not in place all of the time. It was lifted and may not even have been the right mask in the first place. ¶ Given all of these facts and my answers to the questions above, it is still my opinion that whether or not he spent 40 percent of his time inside the truck or even somewhat less, it is reasonably medically probable that this gentleman's oral cancer was a result of his workplace exposures to numerous different chemicals and substances, some of which are known to be carcinogenic.

(WCAB Exhibit X, Stewart A. Lonky, M.D., July 19, 2022, pp. 18 – 19.)

In his September 19, 2022 Order Submitting Case for Decision after Trial, the WCJ stated:

On October 26, 2021, a hearing was conducted herein, and the case was ordered off calendar for the parties to further develop the record. The parties have now completed this task and the trial judge, having now reviewed the entire record, finds that sufficient evidence exists for the purposes of reaching a decision in this case. ... [T]he report of the qualified medical examiner Dr. Lonky[sic] dated July 19, 2022 shall be admitted into evidence Defendant's petition for appointment of an independent medical expert ... is hereby denied and the case is submitted for decision after trial.

The WCJ issued the F&A on October 17, 2022.

DISCUSSION

It has long been the law that the relevant and considered opinion of one physician may constitute substantial evidence, and that the Appeals Board may rely on the medical opinion of a single physician unless it is “based on surmise, speculation, conjecture, or guess.” (*Place v. Workmen’s Comp. App. Bd.* (1970) 3 Cal.3d 372, 378. [35 Cal.Comp.Cases 525]; *Market Basket v. Workers’ Comp. Appeals Bd.* (1978) 86 Cal.App.3d 137 [46 Cal.Comp.Cases 913].)

At his May 3, 2019 deposition, Dr. Lonky was asked if he had a “strong background in toxicology.” (Joint Exh. Y, Stewart A. Lonky, M.D., May 3, 2019, deposition transcript, p. 9.) He responded:

A. I do. ... For the past 25 or 30 years, I've been involved with multiple cases of toxic exposures because my research, when I was here at UC San Diego, as a pulmonary fellow and then as a faculty member, was in the area of lung injury, mostly inhalation injury, but on a biochemical level. ... I started writing some nonscientific articles, became a board member of a medical board of a pharmaceutical company at the time, Rexall, where we looked at various different toxic exposures to heavy metals, to other compounds. And it prompted me to co-author a book which was published in 2007, late 2007, entitled "Invisible Killers: The Truth About Environmental Genocide," about the prevalence of environmental toxins.
(Joint Exh. Y, pp. 9 – 10.)

Dr. Lonky later stated that he had had the opportunity to review a number of material data safety sheets⁴ (Joint Exh. Y, p. 14) and later explained:

A. ... And, if you take a look at patients with oral cancer, which I have some publications you'll see in my CV in the early detection of oral cancer, I worked with the people at NYU in developing diagnostic tests, which is why I know so much about oral cancer.
(Joint Exh. Y, p. 22.)

To be substantial evidence a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) As noted above, the WCJ ordered that, "... QME, Dr. Lonky [sic], shall be provided with sufficient facts by the parties as developed at trial so that he may render an opinion based upon the actual facts of this case." (MOH/SOE, October 26, 2021, p. 7.) After reviewing "the actual facts of this case" Dr. Lonky reiterated his opinion that, "[W]hether or not he [applicant] spent 40 percent of his time inside the truck or even somewhat less, it is reasonably medically probable that this gentleman's oral cancer was a result of his workplace exposures to numerous different chemicals and substances, some of which are known to be carcinogenic." (WCAB Exhibit X, p. 19.)

Having reviewed the entire record, we find no evidence that Dr. Lonky's opinions are speculative or based on an inadequate history. Also, the doctor provided detailed explanations for his conclusions. Further, there is no evidence in the record that is inconsistent with his opinions

⁴The MSDS (Material Safety Data Sheet) lists the hazardous ingredients of a product, its physical and chemical characteristics (e.g. flammability, explosive properties), its effect on human health, the chemicals with which it can adversely react, handling precautions, the types of measures that can be used to control exposure, and ensure safety. (Merriam-Webster Medical Dictionary.)

regarding the cause of applicant's cancer and he clearly explained why he has a "strong background in toxicology." (Joint Exh. Y, pp. 9 – 10.) Thus, Dr. Lonky's reports and deposition testimony constitute substantial evidence and we see no factual or legal basis for defendant's argument that applicant should be evaluated by a toxicologist. Further, it is important to note that a party's arguments are not in and of themselves evidence. Defendant's numerous arguments that Dr. Lonky's reports and deposition testimony are not substantial evidence appear to be legal arguments that are not based on any medical or other expert opinions.

Finally, it is well established that for the purpose of meeting the causation requirement in a workers' compensation injury claim, it is sufficient if the work is a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291 [80 Cal.Comp.Cases 489].) "...[T]he proximate cause requirement of Labor Code section 3600 has been interpreted as merely elaborating on the general requirement that the injury arise out of the employment. The danger from which the employee's injury results must be one to which he or she was exposed in the employment.... All that is required is that the employment be one of the contributing causes ..." (*Id.*, at 297 – 298 [citations omitted].) Defendant argues that Dr. Lonky "... fails to address whether the geothermal scale which was present during non-industrial activities such as road races which would have impacted exposure despite testimony that for 5-6 years applicant would go to 4 or 5 races a year, for 4-5 days, for 8 to 20 hrs. in the desert (Baja)." (Petition, p. 14.) It appears that defendant's argument ignores the fact that applicant's exposure to toxic chemicals at work was a cause of his cancer, not necessarily the cause of his cancer.

Accordingly, we affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 17, 2022 Findings, Award and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 22, 2023

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

**MARIO MORALES
HOWSER LAW OFFICES, INC.
LAW OFFICE OF TRACEY LAZARUS**

TLH/abs

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

**REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

INTRODUCTION

<u>Date of Injury:</u>	September 1, 2008 - April 1, 2017
<u>Age on DOI:</u>	51
<u>Occupation:</u>	DIESEL TRUCK MECHANIC
<u>Identity of Petitioner:</u>	Defendant
<u>Timeliness:</u>	The petition is timely
<u>Verification:</u>	The petition is verified
<u>Date of Decision:</u>	10/17/2022

Petitioner's Contentions

1. That the Worker's Compensation Judge acted in excess of his powers;
2. That the evidence does not justify the Findings of Fact;
3. That the Findings of Fact do not support the Order or Decision or Award

FACTS

Applicant has alleged that the chemicals to which he was exposed during his employment with defendant has caused cancer. The essential facts as found by the WCJ are as follows:

Defendant is in the business of hazardous waste disposal.

Applicant worked for eight years servicing the tanker trucks used by defendant.

Applicant's job duties consisted of maintaining, inspecting, and repairing tanker trucks of all sizes. This included repairing the tanks on the tanker trucks by climbing inside the tank and performing welding for extended periods of time. The tanker trucks needed repairing because whatever material they carried would eat holes in the tank. When applicant entered the tanks, he utilized protective wear in the form of an n100 breathing mask and a rubber suit. When applicant would open up the hatch to inspect the inside of the tank, he would often be hit by vapors from whatever was in the tank. Sometimes he would smell sewage that had been carried in the tanks. The welding inside the tanker truck created fumes and particles. While working inside the tanker truck, applicant sometimes would have to remove his breathing mask because it was very hot and he felt he couldn't breathe, or he needed to drink some water. Applicant credibly stated that in the summer, it gets over 100 degrees at his place of employment, and it would be up to 140 degrees inside the tank.

When he was doing truck repairs, applicant wore an N100 mask only while repairing brakes, clutches, and air filters because these made a lot of dust. Otherwise, he did not wear the N100 mask. While working in the shop in Calipatria, he often smelled welding fumes, diesel fumes, gas fumes, and painting fumes. Applicant stated that during 50 percent of the time that he was working in the shop, he did not have any mask or breathing protection on.

The employer has provided Material Safety Data Sheets (MSDS) of the chemicals which were present at applicant's place of work. These MSDS were submitted into evidence, and reviewed by the QME, after which he concluded that exposure to these chemicals was the cause of the type of cancer that applicant is suffering from. The WCJ found after trial that applicant has sustained the industrial injury as alleged. Defendant has filed a timely petition for reconsideration.

DISCUSSION

1. Does the reporting of QME constitute substantial evidence in regards to causation?

Dr. Stewart Lonky, who is a Diplomate, American Boards of Internal Medicine and Pulmonary Medicine, was chosen by the parties from a panel of evaluators to act as the qualified medical evaluator in this case. The WCJ determined, after hearing the testimony in this case and reviewing the initial reports of Dr. Lanky (Joint exhibits U and V), that the QME had not been provided with an accurate history in regards to the nature of applicant's work and alleged exposure to carcinogenic chemicals. Therefore, the WCJ ordered that the trial transcript be provided to Dr. Lanky so that he may review it and provide a supplemental opinion regarding industrial causation. (MOH 10/26/21 page 7) After review of the trial transcript, Dr. Lanky stated:

"I recognize that there are a lot of moving parts in this case and that, in no case, were any of the exposures massive. However, whether or not he spent 30 percent or 40 percent of his time inside the truck exposed to these particles and potential fumes, and whether or not he lifted his mask off for periods because of perspiration and discomfort, these are all parts of the issue at hand. In other words, this gentleman worked for several years two to three times per week for anywhere from one to four hours at a time with these repeated exposures. Small amounts of exposure can result in the accumulation of carcinogens in sensitive tissue. It is highly unusual to see a patient with oral cavity cancer who is not a drinker and not a smoker. A perusal of World Literature will show that the vast majority, probably well over 80 percent of cases, have this as a background in patients who succumb to this disease. Finding a patient who is neither a smoker nor a drinker and who has developed alveolar ridge squamous cell cancer demands that the clinician looks for an external or environmental agent which could have caused these problems. Given this gentleman's job description and the fact that, although the best intentions of the employer were that these subjects be protected, the history from Mr. Morales was that the mask was not in place all of the time. It was lifted and may not even have been the right mask in the first place.

Given all of these facts and my answers to the questions above, it is still my opinion that whether or not he spent 40 percent of his time inside the truck or even somewhat less, it is reasonably medically probable that this gentleman's oral cancer was a result of his workplace exposures to numerous different chemicals and substances, some of which are known to be carcinogenic." (WCAB exhibit X pg. 18)

The WCJ has concluded that the opinions of the qualified medical evaluator are reasonable, thoughtful, and contain a fact-based explanation of the relationship between applicant's exposure to the chemicals at his workplace, and the resulting cancer.

In addition to this evidence, the WCJ has relied upon photographs of applicant's workplace. Please see defendant exhibit H photographs 12, 35, and 36. These photographs clearly demonstrate the existence of various chemicals at the place of employment. This, coupled with applicant's credible testimony that he often smelled vapors and chemicals while at work supports the conclusion that he was exposed to chemicals.

Defendant has argued that it is applicant's burden to identify exactly which chemicals in the MSDS sheets were present on which days, and exactly what applicant breathed in during his eight years of employment. This places an undue burden on both applicant and the Qualified Medical Examiner, and is contrary to well-established principles of workers compensation law established many years ago by the California Supreme Court:

Intellectual candor may at times require expert testimony in terms of mere probability. For that reason alone, a court cannot demand that experts be more certain, particularly when industrial causation itself need not be certain, but only "reasonably probable." It would be a rare case in which further information would not be of value to the expert. To limit expert testimony to such unique situations would be virtually to abolish it. (*McAllister v. Workers' Comp. Appeals Bd.*, 69 Cal. 2d 408)

Applicant has proved that the employer's MSDS sheets contain the very chemicals which have caused his cancer. The employer cannot reasonably argue that it is more probable that there was absolutely no exposure to the carcinogenic chemicals in question. As stated by the QME, even if the exposure was minimal, it had a cumulative effect. In addition, Worker's Compensation law does not require that the employment be the sole cause of the injury in question. It is only required that the employment be a *contributing factor*. Therefore, the WCJ has held that there was more than sufficient evidence to conclude that there was chemical exposure, and it was a contributing factor in causing applicant's cancer.

Did defendant rebut applicant's testimony regarding exposure to chemicals at work?

At trial, defendant offered the testimony of Jesse Leon, the on-site safety officer for defendant. Mr. Leon offered the following relevant testimony: When applicant had to enter a tanker truck to perform welding, Mr. Leon would use a machine to determine whether certain chemicals were

present. However, the machine would check for only four things: 1. oxygen; 2. carbon monoxide; 3. hydrogen sulfide; and 4. explodable gasses. This was the only machine that was used to detect what was present inside of a tank. Therefore, the evidence is clear that no testing was done to determine whether the carcinogens listed on the MSDS sheets were present inside a tanker truck prior to applicant working inside.

Mr. Leon further testified that there are MSDS sheets for the chemicals that are present in the shop where applicant worked; however, the witness did not know which of these chemicals were actually on site. Mr. Leon did know that sometimes the tanks that applicant worked inside had carried old sewage previously. This raises the question: What was applicant inhaling in addition to welding fumes when he temporarily removed his mask to breathe or drink water while performing repairs inside a tanker truck that was over 100 degrees, and had previously carried sewage? The above facts, plus the employer's status as a hazardous waste disposal company results in a reasonable conclusion that it is more likely than not that the carcinogens which caused applicant's cancer were present in the workplace; that applicant was exposed to them, and applicant's cancer was caused at least in part, by this chemical exposure.

Defendant offered additional testimony from Mr. Donald Couch, who is the Chief Compliance Officer for defendant. This witness was able to offer only generalities about the safety procedures of the employer. This was due to the fact that Mr. Couch's office was approximately 250 miles away from the facility where applicant worked, and the witness was unaware of exactly what materials applicant would handle on a day-to-day basis. Furthermore, this witness testified that he strongly believed that applicant's claim was filed in retaliation for being terminated. After having observed the demeanor of this witness, the WCJ concludes that his testimony is not substantial evidence, and is not relied upon for any purpose in this case.

RECOMMENDATION

It is recommended that reconsideration be denied.

DATED: November 7, 2023

ANDREW J. SHORENSTEIN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE