WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MELINDA DRESSER OAKES; THOMAS OAKES (deceased), ***Applicant***

vs.

ARAMARK, INC.;
ACE AMERICAN INSURANE COMPANY, administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., ***Defendants***

Adjudication Number: ADJ8905938
Long Beach District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration on July 23, 2019 in order to further study the legal and factual issues raised therein, and to enable us to reach a just and reasoned decision. This is our Opinion and Decision after Reconsideration.

Defendant seeks reconsideration of the Findings of Fact (Findings) issued on April 29, 2019 by a workers' compensation administrative law judge (WCJ). The WCJ found that decedent sustained injury arising out of and in the course of his employment (AOE/COE) as a route salesman during the period September 30, 1985 through March 31, 2009 to his lungs and death by asbestos exposure.

Defendant contends that applicant failed to produce substantial evidence that decedent was exposed to asbestos during his employment because the opinions of qualified medical examiner (QME) Frank Ganzhorn, M.D., are based on speculation and hearsay gathered from applicant and a coworker that decedent was exposed to asbestos while picking up rags used to wipe out asbestos containing brake linings.

Applicant filed an Answer to Petition for Reconsideration (Answer). The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) wherein it was recommended that the Petition for Reconsideration be denied.

We have considered the allegations of defendant's Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, it is our decision after reconsideration to rescind the Findings and return

this matter to the trial level for further proceedings consistent with this opinion. When new findings, orders and/or awards are issued, any aggrieved person may timely seek reconsideration.

FACTS

This death claim alleges injury AOE/COE to decedent's lungs as a result of his exposure to asbestos while working as a route salesman for defendant during the period September 30, 1985 to March 31, 2009. (Minutes of Hearing and Summary of Evidence, April 4, 2019 (MOH), p. 2.) The case went to trial on April 4, 2019 on the sole issue of whether decedent was injured AOE/COE. (*Id*., at p. 2:22-24.)

Applicant testified and also called as a witness Craig McDonald, a co-worker of the decedent. (MOH, at pp. 1, 3, 7.) Craig McDonald was decedent's coworker in 1975 when they both worked as route drivers for defendant. (MOH, pp. 3-4.) There was no difference between their routes: they both had retail routes servicing department stores, auto repair shops, and hospitals. (*Ibid.*)[1] About 40 to 50 percent of the customers did automobile repairs. (*Id.*, at p. 5.) Most of the auto repair shops they serviced did all types of repair work, including brake work; some of them did only brake work. (*Id.*, p. 4.) Their responsibilities as route drivers included picking up various items including uniforms (shirts, pants, coveralls), shop towels (red and white rags), mats, and mops. (*Ibid.*) Mr. McDonald knew that the shop towels were used to wipe brakes and the hands of mechanics. (*Ibid.*) They would sometimes grab the shop towels and put them in bags with their bare hands; other times, they would put a bag around the container of shop towels. (*Ibid.*) They picked up uniforms/clothing from piles on the ground. (*Ibid.*) They did not wear masks while doing their work. (*Ibid*.)

Mr. McDonald identified decedent's route as Route 99, but did not know the shops that Mr. Oakes serviced. (*Id.*, at p. 5.) However, Mr. McDonald testified that it was probable that decedent would have delivered and picked up auto repair shop rags that performed brake work. (*Id.*, at p. 6.) There is no evidence in the record from defendant regarding the customers serviced on Route 99.

Mr. McDonald also recalls that when he worked in defendant's plant, there were steam lines from the boiler room; he would be required to take insulation from the pipe and drop it onto

[1] Mr. McDonald identified decedent's route as Route 99; there is no evidence in the record from defendant regarding the customers serviced on Route 99.

the ground. (*Ibid.*) Mr. Oakes would walk through the plant when he was a route driver. (*Ibid.*) There is no evidence in the record from defendant regarding the insulation used on the steam pipes in its plant during the years decedent was employed.

Applicant also called decedent's widow, Melinda Dresser-Oakes. (MOH, pp. 7-8.) She married decedent in 1995, and lived with him four to five years prior to marriage. (*Ibid.*) He worked for defendant when they were married until he retired in April 2009. (*Ibid.*) Decedent retired as a full-time route driver in April 2009, and worked part-time in the accounts receivable department until he was laid off in 2010. (*Ibid.*) Decedent talked to her about his work as a route driver which included picking up uniforms, mats, towels, and red rags from auto shop floors and throwing them in the back of his truck. (*Ibid.*) He told her he did not wear a mask while doing this work. (*Ibid.*) Mrs. Dresser-Oakes recalled that decedent's customers included Michael Automotive (Chevrolet), Ford, Jay Eight Sanders (a Mercury dealership), Dales Auto Shop, Dorman Auto, Pep Boys, Midas, Caterpillar, Harley Davidson, Fun Cars, Kragen, and Cal Trans. (*Ibid.*) She went with him to the pulmonologist appointment, and decedent told the pulmonologist that the red rags were used to wipe brakes. (*Ibid.*) Decedent did not do brake work on his own car, and did not know how to work on cars. (*Ibid.*) His work in the Navy included two days on a ship scraping paint off of a turret. (*Ibid.*) Mrs. Dresser-Oakes was not aware of any other way decedent would have been exposed to asbestos. (*Ibid.*)

Defendant called Mark Papendorf, a National Accounts Executive for defendant Aramark, Inc. (MOH, at pp. 1, 6.) He started with defendant in 1979 as a utility driver; he then worked as a route driver for Route 95 for five to six years; as a district manager for three to four years; assistant general manager and then general manager for about 12 years; and was at the time of his testimony, a national account executive. (*Id*., at p. 6.) Mr. Papendorf confirmed that route drivers picked up shop towels from customers who did brake automotive work, which included picking up bags of towels and picking up the towels and putting them in the bags when customers threw them near the bins. (*Id.*, at pp. 6-7.) They also picked up uniforms and overalls that were worn by auto shop repairmen, which included handling the clothing. (*Id.*, at p. 7.) He knew Mr. Oakes' route 99, but did not recall the name of the businesses on that route between 1975 and 1978, or when they started working with Kragen Auto Parts; however, that information would be on the route settlement sheets which contained customer names and numbers. (*Id.*, at pp. 6-7.) He thought decedent had auto dealerships on his route, including Michael Automotive. (*Id.*, at p. 7.) Mr. Papendorf knew

that brake pads had asbestos in them, but did not know if the shop rags had asbestos in them, or if there was brake dust in the rags when he picked them up. (*Ibid.*) He did not know what year they stopped using asbestos in brake pads. (*Ibid.*)

Applicant introduced and the WCJ admitted a letter from applicant's counsel to QME Dr. Ganzhorn dated September 21, 2018 (App. Exh. 1). There were also four joint exhibits admitted by the WCJ including: a December 17, 2016 report from QME Dr. Ganzhorn (Joint Exh. A1); the June 23, 2017 deposition of QME Ganzhorn (Joint Exh. A2); a November 28, 2018 supplemental report from QME DR. Ganzhorn (Joint Exh. A3); and, decedent's death certificate dated December 28, 2012 (Joint Exh. A4). (Id., p. 3.)

QME Dr. Ganzhorn concluded that decedent had "sarcomatoid mesolthelioma." (Joint Exh. A1, p. 8.) Decedent's death certificate identifies the cause of death as "Stage IV Sarcomatoid Mesothelioma Carcinoma" (mesothelioma). (Joint Exh. A4, p. 4.) QME Dr. Ganzhorn also concluded that "[e]xposure to asbestos is thought to be responsible for most cases of malignant mesothelioma, and can be documented in about two-thirds of all patients with mesothelioma. (Joint Exh. A1, p. 9.) Dr. Ganzhorn testified at deposition that "over 80 percent of the time, if somebody has mesothelioma, it is due to asbestos exposure..." (Joint Exh. A2, pp. 8-9.)

It was Dr. Ganzhorn's opinion that due to the general 15-year latency period for mesothelioma, decedent's exposure to asbestos "up until 1997...should be counted as resulting in the development of his malignant mesothelioma and his death caused by sarcomatoid mesothelioma." (*Ibid.*)[2] "It appears that the main way that Mr. Oaks would have been exposed to asbestos would have been from his handling of the red rags which he picked up at automobile shops which were apparently used to wipe out brake linings." (*Id*., at p. 8.) Dr. Ganzhorn testified in deposition that exposure to the red rags "was pretty much the only asbestos exposure that we could figure. So...it seems reasonable to me that this is how it happened, but...unfortunately, all we have is the testimony of [decedent's] wife that he recounted this to her." (Joint Exh. A2, pp. 8-9.) Dr. Ganzhorn relied on testimony from Mrs. Oakes that she was present in the room when the decedent told his treating pulmonologist, Dr. Van Gundy, that the red rags were used to wipe the breaks and would then be thrown in a corner. (*Id.*, pp. 9-12.) Dr. Ganzhorn reviewed the deposition

[2] Dr. Ganzhorn testified that in 90% of mesothelioma cases, the latency period is 15 years or more, although it can be up to 40 years. (Joint Exh. A2, p. 16.)

of Craig McDonald, which did not change the conclusions he expressed in his original report of December 17, 2016. (Joint Exh. A3, p. 1.)[3]

QME Dr. Ganzhorn also testified in deposition that although he could not cite to a specific medical or industrial journal, "it is pretty much common knowledge that in the past, brake shoes were – contained asbestos. Currently they don't." (Joint Exh. A2, p. 12.) Dr. Ganzhorn could not cite to a specific study related to the rates of auto shop mechanics who are diagnosed with mesothelioma, although he did recall studies that undermined the credibility of studies "that purport to show that X, Y, or Z occupation has no increased incidence of mesothelioma." (*Id.*, at p. 20.) He was "pretty confident" that there are no studies related to workers who pick up rags used to wipe out brakes and their rate of mesothelioma. (*Id*., at p. 21.) Given the low incidence rate of mesothelioma of about 3,000 cases per year in the United States, studies involving mesothelioma are difficult. (*Ibid*.) People contract mesothelioma in strange ways, including just standing around another person doing work with asbestos containing products. (*Ibid*.) Dr. Ganzhorn has "seen wives of pipe fitters and insulators who – you know they would come home from work, then the wife shook out their clothes and then wife comes down with asbestos associated lung cancer, asbestosis, mesothelioma." (*Id.*, at p. 33.)

Dr. Ganzhorn did not have any independent knowledge of when the transition was made from using asbestos in brake linings, to not using asbestos. (Joint Exh. A2, p. 12.) Dr. Ganzhorn has reviewed "a lot of mesothelioma cases," and based on his prior review of testimony in other such cases, he generally knows that there was asbestos in brake shoes. (*Id.*, p. 13.) However, in those other cases, "they wouldn't rely on a clinical pulmonologist to tell you the answer to that question." (*Ibid.*) Rather, there would be a "product guy" who would offer testimony during what years asbestos was used in brake linings. (*Ibid.*) Dr. Ganzhorn knows that brake shoes contained asbestos in the past, but would defer to a "product person" to say which type of asbestos was in brake shoes. (*Id.*, at p. 35.) Dr. Ganzhorn hoped that the parties "goes and buys an industrial hygienist to help me sort this out." (*Id*., at p. 30.)

Dr. Ganzhorn testified that the level of exposure to asbestos needed to cause the development of mesothelioma is "any exposure to asbestos fibers above background..." (Joint Exh. A2, p. 33.) In relation to decedent's alleged exposure to asbestos, Dr. Ganzhorn testified as follows:

[3] The deposition of Craig McDonald, dated August 24, 2108, was not produced by either party or admitted into evidence.

A. We have no idea exactly how many rags that Mr. Oakes picked up and brought back to the shop after brakes were wiped, actually contained asbestos. But I think it is a safe bet that over this period of years, when he was picking up rags that were used to wipe out brakes, that a number of them had asbestos on them. He breathed in the asbestos fibers, and that is how he ended up with mesothelioma and dying from mesothelioma.

Q. Well, in terms of the actual exposure, assuming that the red rags did have asbestos on them, do you have an opinion as to the frequency or the regularity as to the number of rags that would need to be -- he would need to be exposed to and on what period, what year of exposure or years of exposure would.be necessary to contribute to the mesothelioma?

A. You know, I don't think I have any scientific way of answering that question.

Q. Would it have to be sort of a daily exposure? Would it have to be once a month if he picked up the rags? Do you have any kind of benchmark that we can go off of?

A. Well, I think any exposure to asbestos above background exposure would be thought of in this case as being causal for his malignant mesothelioma.
...

Q. Okay. And, again, assuming that he did pick up red rags that would have asbestos on them, did it occur once a month where he went to auto shops and picked them up? Would that be sufficient exposure?

A. I don't think there is any scientific way to answer that question. I think we would be speculating. I mean, I think the guy -- I think the guy picked up rags that had asbestos on them. I don't know if he did it every day, twice a day, once a month, every day except Sunday. I don't know. All I know is what it says here in this deposition of Mrs. Oakes.
...

THE WITNESS: Okay. Now, if you were to look at the last couple lines in my history of present illness, occupational history, page 5, it says that the workers at the auto shop would, quote, take the rags after they were done with them and throw them in a corner or a box or a pail, and Mr. Oakes would have to go pick them up, count them, put them in a sack, put them back in his truck and he had to count them, because he had to bring so many back.
...
A. So that means to me that it seems likely that there was quite a few of these rags.
...

A. In the information that I got, here, the main asbestos exposure that Mr. Oakes told his pulmonary doc about was these red rags.

Q. It also -- it would be fair to conclude that we don't know the nature and extent of his exposure, at least at this time?

A. Well, you know, we were not there.
...

A. But it seems reasonable that he was exposed to asbestos -- reasonable to me, that he was exposed to asbestos picking up these rags that were used to wipe brakes.
...

A. And transporting them back to Aramark and also Valley Industrial Services. So, I mean, I think – I think likely since this happened over a period of a number of years, he was exposed to asbestos, you know, considerably. I mean, not as much as an insulator or a pipefitter, but I think he was exposed to asbestos over a 31 year period of time. And he got mesothelioma. And this is the only thing we can really point to that would have caused his mesothelioma. (*Id.*, at pp. 14-15, 27-28.)[4]

Based on this evidence, the WCJ found that decedent sustained an injury arising out of and occurring in the course of employment to his lungs and death by asbestos exposure during the period September 30, 1985 through May 31, 2009. (Findings, Findings of Fact no. 1.) The WCJ explained that applicant met the burden of proof to establish that decedent's death arose out of and in the course of his employment with defendant to his lungs as a result of exposure to asbestos and ultimately, death from that exposure. (Findings, Opinion on Decision, pp. 1-2.) This finding of fact was based on the unrebutted and credible testimony of Mr. McDonald and Mrs. Dresser-Oakes that decedent physically handled red rags used by auto mechanics to wipe out brake drums, as well as the unrebutted opinion of QME Dr. Ganzhorn that the red rags picked up by decedent were the mechanism of asbestos exposure that resulted in the development of sarcamatoid mesothelioma. (*Ibid.*)

In the Report, the WCJ further explained that his Findings were based on uncontroverted and substantial evidence. Specifically, the WCJ clarified that contrary to defendant's assertion that "there was no direct evidence to establish the decedent's mechanism of industrial exposure to

[4] We note that the deposition of decedent's widow, Melinda Dresser-Oakes, was not produced or admitted into evidence.

asbestos," the unwavering opinion of Dr. Ganzhorn that applicant was exposed to asbestos from the red rags used to wipe out brake drums, was based on the scientific literature and information provided to him by the parties. (Report, at p. 3.) The credible testimony of Mr. McDonald and Mrs. Dresser-Oakes that applicant physically handled the red rags used to wipe out brake drums was not impeached, rebutted, or otherwise controverted. The WCJ rejected defendant's assessment that applicant made no effort to obtain information directly from the "offending sources" of the red rags, i.e., decedent's customers:

> The Petitioner argues that the "applicant made no effort to obtain any information directly from the supposed offending sources" (Petition for Reconsideration, page 9, lines 11-12); however, it should be noted that, just as in the McAllister case, the Petitioner was in the best position to secure such information and, the "employer should be encouraged to come forward with all relevant data available to it*."* McAllister v. Workers' Comp. Appeals Bd. (1968) 69 Cal.2d 408, 416. Here, the Petitioner has not demonstrated that it provided a list of the sites that the applicant serviced. As such, the Petitioner's position overlooks that it was in the best position to provide that information during the discovery process and failed to do so. (Report, p. 3, fn. 3.)

Instead, the WCJ explained that it was defendant who failed to impeach, rebut, or otherwise contravert the credible evidence provided by Mr. McDonald, Mrs. Dresser-Oakes, and Dr. Ganzhorn. (Report, p. 4.)

> It has long been recognized that courts must assume the accuracy of testimony when there is a failure to introduce contradictory evidence. McAllister v. Workmen's Comp. Appeals Bd. (1968) 69 Cal.2d 408, 413. Additionally, courts have also recognized that the board must accept as true the intended meaning of testimony both uncontroverted and unimpeached. McAllister v. Workers' Comp. Appeals Bd. (1968) Cal.2d 408, 413 (referencing Wilhelm v. Workmen's Comp. App. Bd. (1967) 255 Cal.App.2d 30, 333). Furthermore, Labor Code §3202.5 states as follows:
>
> > All parties…shall meet the evidentiary burden of proof on all issues by a *preponderance of the evidence… "Preponderance of the evidence*" means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. (emphasis added). (Report, p. 4.)

DISCUSSION

It is a fundamental principle of the workers' compensation system that an employer is liable for an injury to an employee, "…arising out of and in the course of the employment…" (Lab.

Code, § 3600(a); *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 732-733 [48 Cal.Comp.Cases 326] (*Maher*).) "In applying it, this court must be guided by the equally fundamental principle that the requirement is to be liberally construed *in favor of awarding benefits*. (Lab. Code, § 3202; *Laeng v. Workmen's Comp. Appeals Bd*. (1972) 6 Cal.3d 771, 777-778….; *Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 317…; *Scott v. Pacific Coast Borax Co.* (1956) 140 Cal.App.2d 173, 178…)" (*Maher, supra*, 33 Cal.3d at 733, emphasis in the original.)

Applicant bears the initial burden of proving that decedent's injury arose out of and in the course of his employment as a route driver for defendant. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297 298, 302; Lab. Code, §§ 5705; 3600(a).) The concept of "in the course of the employment" generally "…refers to the time, place, and circumstances under which the injury occurs." (*Maher, supra*, 33 Cal.3d at 733.) "Arising out of" employment generally refers to the causal connection between the employment and the injury. (*Id*.) In other words, the employee must be exposed to the "danger from which the injury results" as a result of his or "particular employment." (*Maher, supra*, 33 Cal.3d at 734 n.3 citing *Industrial Indem. Co. v. Ind. Acc. Com.* (1950) 95 Cal.App.2d 804, 809.) The burden of proof shifts to the employer once an applicant makes a "prima facie showing…of exposure to the danger involved." (*McAllister v. Workmen's Comp. Appeals Board* (1968) 69 Cal.2d 408, 416 [33 Cal.Comp.Cases 660] (*McAllister*).)

In this case, the issue is whether decedent's injury arose out of his employment, i.e., the issue raised relates to the causal connection between decedent's job duties as a route driver, and the development of the mesothelioma that caused his death. The burden of proof in workers' compensation is governed by the preponderance of evidence standard.

> All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. "Preponderance of the evidence" means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. (Lab. Code, § 3202.5.)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc).) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the

responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.)

Here, the WCJ provided the basis for his decision in the Opinion on Decision by referring to what he called the unrebutted and credible testimony of Mr. McDonald and Mrs. Dresser-Oakes that decedent physically handled red rags used by auto mechanics to wipe out brake drums. In addition, the WCJ referred to the unrebutted opinion of QME Dr. Ganzhorn that the red rags picked up by decedent were the mechanism of asbestos exposure that resulted in the development of sarcamatoid mesothelioma.

Of course, a WCJ's decision must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute 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, 621 (Appeals Bd. en banc).)

The WCJ clarified in the Report that contrary to defendant's assertion that "there was no direct evidence to establish the decedent's mechanism of industrial exposure to asbestos," the unwavering opinion of Dr. Ganzhorn that applicant was exposed to asbestos from the red rags used to wipe out brake drums, was based on the scientific literature and information provided to him by the parties. (Report, at p. 3.) The WCJ reiterated that the credible testimony of Mr. McDonald and Mrs. Dresser-Oakes that applicant physically handled the red rags used to wipe out brake drums was not impeached, rebutted, or otherwise controverted. The WCJ rejected defendant's assessment that applicant made no effort to obtain information directly from the "offending sources" of the red rags, i.e., decedent's customers, by reminding defendant that it was in the best position to secure such information. (*McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 416 [the "employer should be encouraged to come forward with all relevant data available to it"].) The WCJ clearly determined that applicant met her burden of proof to establish that decedent's injury arose out of his employment as a route driver for defendant, and that it was defendant who failed to impeach, rebut, or otherwise contravert the credible evidence provided by applicant, Mr. McDonald, and Dr. Ganzhorn. (Report, p. 4.) In other words, when the burden of proof shifted to

defendant, defendant failed to establish that decedent's injury was not caused by exposure to asbestos from the red rags used to wipe out brake drums that decedent physically handled while employed for defendant as a route driver.

It is true that the Supreme Court of California has long held that an employee need only show that the "proof of industrial causation is reasonably probable, although not certain or 'convincing.'" (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660]; see also *Clark, supra*, at p. 298 ["it is sufficient if the connection between work and the injury be a contributing cause"].) In order for an injury to arise out of employment, the employment need only be "'"one of the contributing causes"'" of the injury. (*Clark, supra*, 61 Cal.4th at pp. 297-29 quoting *Latourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253] (*Latourette*) quoting *Maher, supra*, 33 Cal.3d. at p. 734, fn. 3.)

In this case, there is credible and substantial evidence from applicant and Mr. McDonald, that decedent handled red rags used by auto mechanics to wipe out brake drums starting in at least 1975, and per applicant, through April 2009. There is also credible and substantial evidence from Dr. Ganzhorn, Mr. McDonald, and Mr. Papendorf that at some point, brake linings contained asbestos, and from Dr. Ganzhorn that decedent's mesothelioma could have developed from exposure to dust from asbestos-containing brake linings. The WCJ is correct that courts must assume the accuracy of testimony when there is a failure to introduce contradictory evidence; and, that the Appeals Board must accept as true the intended meaning of testimony both uncontroverted and unimpeached. (*McAllister, supra,* at p. 413 citing *Wilhelm v. Workmen's Comp. App. Bd*. (1967) 255 Cal.App.2d 30, 333.) We therefore accept the evidence provided by applicant, Dr. Ganzhorn, Mr. McDonald, and Mr. Papendorf as to these facts.

In workers' compensation, "[t]he burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].) Contrary to defendant's argument, when direct evidence of causation is unavailable, "'[c]ircumstantial evidence is sufficient to support an award of the commission, and *it may be based upon the reasonable inferences that arise from the reasonable probabilities flowing from the evidence; neither absolute certainty nor demonstration is required.*' (citations)" (*Guerra v. Workers' Comp. Appeals Bd*. (2016) 246 Cal.App.4th 1301, p. 1307, emphasis added.) In this case, there is both direct and circumstantial evidence that brake linings contained asbestos; that the red rags handled by decedent were used by mechanics to wipe out

brake drums; and, that if the brake linings being wiped out contained asbestos, then decedent developed mesothelioma as a result of handling those red rags. However, there is unfortunately no evidence in the record stating *when* asbestos was used in brake linings. Without this information, it is not possible to establish whether decedent's handling of the red rags between 1975 and 2009 exposed him to dust from brake linings containing asbestos.[5]

We also note that we find no evidence in the record regarding when decedent started working as a route driver for defendant, i.e., when he started handling the red rags. The WCJ found that decedent sustained injury arising out of and in the course of his employment to his lungs and death by asbestos exposure during the period September 30, 1985 through March 31, 2009. (Findings, Findings of Fact no. 1.) However, there is credible and substantial evidence that decedent's potential period of exposure started in at least 1975, and that as he was already working for defendant when Mr. McDonald started in 1975, it is likely that the potential exposure started before 1975.

Accordingly, because the dates of asbestos use in brake linings is not yet established and because the correct period of potential exposure has not yet been determined, it is our decision after reconsideration to rescind the Findings, and return this matter to the trial level for further proceedings consistent with this decision.

[5] Mr. McDonald also testified that decedent walked through the plant while Mr. McDonald was pulling off insulation from steam lines running from the boiler. Again, there was no evidence produced about whether the insulation on steam lines would contain asbestos during the time period Mr. McDonald observed decedent walking through the plant while he was disturbing that insulation.

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued on April 29, 2019 by a workers' compensation administrative law judge is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 24, 2022

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

MELINDA DRESSER OAKES
THOMAS J. TUSAN, ESQ.
BRADFORD & BARTHEL

AJF/abs

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