WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JULIE SOKSODA KEHOE, ***Applicant***

vs.

SHASTA COUNTY DISTRICT ATTORNEY'S OFFICE,
permissibly self-insured, as administered by
SHASTA COUNTY RISK MANAGEMENT, ***Defendants***

Adjudication Numbers: ADJ16043082; ADJ16284450
Redding District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion, which are both adopted and incorporated herein, we will deny reconsideration.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. *(Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 18, 2023

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

JULIE SOKSODA KEHOE
MASTAGNI HOLSTEDT
LAUGHLIN, FALBO, LEVY & MORESI

PAG/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

I.

INTRODUCTION

1. Occupation: District Attorney Investigator
2. Age at Injury: The Applicant was 36 on the date of injury.
3. Date of Injury: 8/26/21
4. Parts of Body Injured: COVID 19 infection, lungs/pneumonia, brain/cognitive.
5. Manner of Injury: COVID 19 infection and pneumonia presumed from exposure at work, brain/cognitive impairment derivative of COVID 19.
6. Identity of Petitioner: The petitioner is the defendant.
7. The petition was timely filed and verified.
8. The Findings of Fact and Order were issued on 9/25/23, and both were the subject of the appeal.
9. Petitioner's Contentions: The petitioner contends that substantial evidence was provided sufficient to rebut the presumption of industrial injury found in LC section 3212.87, and that this evidence was not considered.

Petitioner further contends that credible evidence concurrent with the applicant's original hospital visits support the argument that the COVID 19 infection was acquired non-industrially.

Petitioner contends that testimony from defendant's witnesses to the effect that they were in a position to know whether anyone employed by Shasta County was COVID 19 positive during the relevant time frame, and they knew of no such infected county employees, is sufficient to rebut the presumption of industrial exposure per LC section 3212.87.

II.

FACTS

The applicant, while working as an Investigator for the Shasta County District Attorney's Office, was diagnosed with a COVID 19 infection in August of 2021. She had already had one bout with COVID 19 the year before, but had returned to full duty.

Prior to the manifestation of her COVID 19 symptoms, the applicant had participated in early August 2021 in a training program in Sacramento wherein she trained with approximately 40 other people from all over the state. This program lasted from 8/8/21 to 8/13/21. After returning to Shasta County, beginning on August 17th, she was on a hiring panel that performed oral interviews with candidates, and she estimated she spoke in person with about 16 candidates during this process.

The applicant was then assigned to work the Dixie Fire on August 21st. During this assignment she began experiencing significant fatigue, sneezing, and coughing.

By the 23rd of August, the applicant was feeling very sick, and she went to the Hilltop Medical Clinic on 8/26/21. The Hilltop records document a history of fever, aches, fatigue, cough, shortness of breath and sore throat, and that these symptoms had been experienced over the previous 14 days. The applicant's COVID 19 diagnosis was confirmed by PCR testing on 8/30/21.

During this same time, the applicant's daughter also became sick, and tested positive for COVID 19 on 8/22 or 8/23/21. The applicant assumed her daughter had caught COVID from daycare, but changed her mind several months later when she learned that no one at the daughter's daycare had such an infection.

Because of the applicant's increasing symptoms, she was admitted to the hospital on 9/1/21, and stayed hospitalized until her discharge on 9/25/21. While at the hospital, an additional diagnosis of COVID related pneumonia was made.

Applicant asserted that the COVID 19 infection she experienced in August of 2021 was work related, evoking the presumption of LC section 3212.87. Defendant/Petitioner denied liability, asserting that the applicant caught the virus from her daughter.

The parties used Dr. Scott Anderson as a PQME, and this evaluator wrote one report and was deposed on one occasion. After clarification at deposition of some erroneous history the doctor had noted in his written report, he found that the applicant had likely caught the virus from work, and not from her daughter.

This question went to trial, and a Findings of Fact, Order and Opinion on Decision issued on 9/25/23. It is from this decision that the petitioner appeals.

III

DISCUSSION

The Petitioner agrees that the applicant has properly asserted the presumption of industrial injury as set forth in LC section 3212.87.

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. (**Evidence Code section 606; City of Long Beach v. WCAB (Garcia) 126 Cal. App. 4th 298, 314**.) Once the facts giving rise to the presumption of industrial injury have been proven, the burden of negating the presumption falls on the employer. The defendant must establish that the COVID 19 illness did not arise out of and in the course of employment. To do that, the defendant must show

substantial evidence that convincingly shows that the COVID 19 infection did not arise out of and in the course of employment. **Sevillano v. State of California 2022 Cal. Wrk. Comp. P.D. Lexis 255.**

Let us first dispense with the report and deposition transcript of the PQME, Dr. Anderson (Joint Exhibits AA and BB). Even after being given the correct history at his deposition, this evaluator was still firmly of the opinion that the applicant acquired her COVID 19 at work. (Joint Exhibit BB, page 24: 18-24; page 25: 2-20). Petitioner argues that the opinion of this evaluator is not substantial evidence on this issue. If true, then the doctor's opinion offers petitioner no assistance in rebutting the presumption. If it is substantial evidence, it supports the application of the presumption. Either way, it is of no assistance to the petitioner in accomplishing the rebuttal of the presumption.

Petitioner next argues that the two employer witnesses who testified at trial establish through their sworn testimony that there were no Shasta County employees in August of 2021 that they were aware of that were COVID 19 positive. This testimony is unrebutted, and we may treat it as truthful and as showing that there was no one employed by Shasta County that these two county employees knew of with a COVID 19 infection during the relevant timeframe of August of 2021.

However, the presumption of 3212.87 was not made law only to protect public employees from infection through other employees. On the contrary, the idea was to lower the burden of proof for essential employees that "keep the lights on, water running, food stocked, and treat our ill and injured." The applicant's job required her not just to work with other county employees, but with the public, as well as other public employees. In this case, that specifically included interaction with about 40 other officers from all over the state at the Sacramento seminar, with about 16 candidates for employment with the county, and with the public and other public service providers during the Dixie Fire, all in the month of August 2021. Because of this rather extensive exposure to non-Shasta County employees during the critical month of August 2021, the testimony of the two county witnesses does not establish that the applicant did not get her COVID infection from her job, only that perhaps a slice out of the pie of potential work related exposure vectors can be removed. This testimony therefore does not serve as sufficient substantial evidence to rebut the presumption.

Next, petitioner argues that the applicant got the infection not from her work, but from her daughter. However, the evidence in the case establishes that they both developed symptoms and tested positive within a few days of each other (Defendant's Exhibit A and F; Summary of Testimony, page 4: 24-25), and no medical evidence specifically analyzes the situation to make a clear and unambiguous determination of who infected who.

Petitioner argues that because the applicant agrees she suffers from "brain fog" as a result of her COVID 19 infection, none of her testimony can be trustworthy and from that, cannot be substantial evidence.

Although it is true that the applicant suffers from "brain fog," or more properly a cognitive impairment that affects her ability to accurately recall dates and events, that does not necessarily mean that all the applicant's testimony is automatically to be rejected.

Because of this, when considering the timeline of events, this judge compared the applicant's testimony to the contemporaneous medical record to see if it would match up. In doing so, it could be determined that during her first visit to a doctor, at Hilltop Medical Clinic, on 8/26/21, a history was taken of a variety of COVID 19 related symptoms that she had been having over the last 14 days (Defendant's Exhibit A, page 23). This history is consistent with the applicant's testimony of her symptoms beginning in earnest on or about 8/21/21, and accelerating into significant illness by 8/23/21 (Summary of Testimony, page 4: 22-24: page 6: 5-7; 13-14).

Meanwhile, her daughter became sick on 8/22 and tested positive the next day.

The question of how the daughter got her COVID 19 infection is not addressed in any detail by any physician. Initially, the applicant believed the daughter caught the virus at daycare, but several months later learned that no one else there was sick in August. The applicant initially repeated this speculative history to the treaters, who simply repeated it in their reporting, but without any further discussion or analysis.

Petitioner argues that the applicant was first symptomatic on 8/26, citing doctor's notes from Mercy (Applicant's Exhibit 3, page 22). However, the 26th was when the applicant first sought treatment at Hilltop, and those records in turn document numerous symptoms over the prior 14 days. Although, as petitioner represents, that doesn't mean she had such symptoms for all 14 days, but it does support the applicant's testimony that her first symptoms occurred on or about 8/21, and then worsened to the point where she sought medical attention on 8/26.

However, petitioner has offered no real medical evidence to support their position that the applicant got her infection from her daughter. The best petitioner can do is point to notations in the early medical record that record the daughter's concurrent COVID 19 infection, but nothing more. There is in the record no medical report offering any analysis or discussion of whether the applicant caught the virus from her daughter, or vice versa. Further, the PQME, Dr. Anderson, declined in his deposition to attribute the applicant's COVID 19 infection to her daughter (Joint Exhibit BB, page 25: 3-20).

Therefore, the position that the applicant was infected by the daughter is conclusory and speculative. Such evidence is by definition not substantial. Merely offering a possible alternative scenario for infection is not the same as proving to a reasonable medical probability via substantial evidence that the applicant's infection did not come from her work.

Therefore, the petitioner's evidence does not rebut the presumption.

In summary, petitioner has offered only an argument that there is a possible alternative source for the applicant's COVID 19 infection, but has offered no substantial medical evidence to support that position. Without such evidence, the petitioner's position boils down to the mere possibility that the infection was non-industrial, which is in its face insufficient to rebut the presumption.

IV.

RECOMMENDATION

For the foregoing reasons, it is respectfully recommended that the Petition for Reconsideration be denied in its entirety.

Date: 10/25/23

Curt Swanson
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

FACTS

All parties agree that the applicant, as an investigator for the Shasta County District Attorney's Office, enjoys a rebuttable presumption under Labor Code section 3212.87 and Penal Code section 830.1 that the development of a COVID-19 infection was a compensable industrial injury. The parties agree that in August of 2021 the applicant developed such a COVID-19 infection, and this was confirmed within 14 days of her last day at work via a PCR (Polymerase Chain Reaction) test (Applicant's Exhibit 2). Specifically, she last worked on August 21st, 2021 on the Dixie fire, and had her COVID infection confirmed via PCR test on August 30th.

The question now presented is whether there are facts and evidence sufficient to rebut the presumptive industrial injury.

We must begin with the recognition that this is not the first time the applicant has had a COVID-19 infection. She testified under oath and without rebuttal that she had previously had a bout with this virus in November of 2020 (Summary of Testimony, page 7: 5-6), and this was confirmed on the first page of the Mercy Medical records under the "history" section (Defendant's Exhibit B).

At work, the events leading up to her positive test were interesting. In early August of 2021, she participated in a training program which required her to travel to Sacramento and lasted from 8/8/21 to 8/13/21. During that program, she trained with approximately 40 other officers from all over the state, and spent time sitting at tables together without masks. No one she could recall acted sick at this event (Summary of Testimony, page 4: 8-13).

She returned to work on the 17th of August, and then participated in oral board interviews on a panel interviewing people applying for jobs. She estimated they interviewed about 16 people. She did not recall anyone looking sick at this activity (Summary of Testimony, page 4: 15-19).

Next, she was assigned to work the Dixie fire on August 21st. This job required her to patrol, provide security, man checkpoints and meet with other agencies working the fire (Summary of Testimony, page 4: 20-23). During this assignment, she began sneezing, coughing and feeling tired. She felt so tired one day that she overslept and was late for work. She described this at trial as a feeling of exhaustion (Summary of Testimony, page 4: 22-24; page 6: 5-7). At the earliest, the applicant began having symptoms on 8/21/21 (Summary of Testimony, page 6: 5-7), or sometime between the 22nd and 24th of August, 2021 (Summary of Testimony, page 5: 9-10). She testified that by the 23rd of August, she was very sick (Summary of Testimony, page 6: 13-14). Her first visit to a doctor because of these symptoms occurred on 8/26/21 when she went to the Hilltop Medical Clinic. These records are in evidence as Defendant's Exhibit A. In the intake report, the doctor at Hilltop recorded symptoms of high fever, aches, fatigue, cough, shortness of breath, sore throat and vomiting, and that these symptoms had been experienced over the last 14 days. This history is consistent with the applicant's testimony as cited above.

The applicant's COVID-19 diagnosis was confirmed by PCR testing on 8/30/21.

Meanwhile, her daughter developed symptoms of COVID-19 and tested positive on 8/22 or 8/23/21 (Defendant's Exhibit A and F; Summary of Testimony, page 4: 24-25).

The applicant testified that her daughter would normally go to daycare, and at least at first, the applicant assumed her daughter caught the virus from there. However, several months later, she learned that no other children at the daycare had come down with COVID-19.

When the daughter developed COVID, she was taken out of daycare and quarantined at home, and the applicant requested leave from work to care for her on 8/24/21 (Defendant's Exhibit F).

At about this same time, the applicant did in fact become quite ill, and because of the increasing severity of her symptoms was admitted to the hospital on 9/1/21, and kept there until her discharge on 9/25/21 (Applicant's Exhibit 3). While at the hospital, the additional diagnosis of pneumonia in the applicant's lungs was made.

The applicant remained off work until January of 2022. At about that time, she became aware that none of the other children at her daughter's daycare had come down with COVID-19. This new information caused her to wonder if she actually contracted her COVID-19 infection at work. She filed claim forms soon thereafter (Summary of Testimony, page 5: 17-24; page 7: 13-14).

The parties used Dr. Scott Anderson as a PQME, and he wrote one report and was deposed on one occasion (in evidence as Joint Exhibits AA and BB, respectively).

Finding themselves unable to resolve the question of where the applicant acquired her COVID-19 infection, whether or not the statutory presumption applied, or whether that presumption, if it applied, had been rebutted, the parties submitted these questions to the board for decision after trial.

This decision now issues.

THE LEGAL STANDARD

In response to the COVID-19 pandemic, the California Legislature passed Senate Bill 1159 which establishes a rebuttable presumption that illness or death resulting from COVID-19 arose out of and in the course of employment for specified employees. SB 1159 was passed as an urgency statute and took effect immediately when signed into law by Gov. Gavin Newsom on Sept. 17, 2020.

SB 1159 adds three new Labor Code sections that establish COVID-19 presumptions, one of which was LC section 3212.87, which applies to front-line workers (peace officers, firefighters, health-care providers, home care workers and IHSS workers).

In considering this legislation, the Legislature recognized that the pandemic nature of COVID-19 challenged how infectious diseases historically have been handled in the workers' compensation system. The Senate Floor Analysis stated that, "While COVID-19 is present in all California communities, the burden of fighting the disease has fallen disproportionately to a small group of workers in both the private and public sectors. These workers keep California's lights on, water running, food stocked, and treat our ill and injured. Therefore, it intuitively makes sense that

extending a presumption to these workers would further the cause of justice: by reducing the barriers to accessing the workers' compensation system, and ensuring that these essential workers suffering from COVID-19 will receive the healthcare they need, when they need it, without delay."

Considering this background, LC section 3212.87(b)(1) and (2) requires a showing that, first, the applicant performed labor or services at their place of employment at the employer's direction on or after 7/6/2020.

This is clearly established in our case by the facts and evidence cited above.

Next, the employee must show that they tested positive for COVID-19 within 14 days after a day they worked at their place of employment and at the employer's direction.

This is also established in our case by the facts and evidence cited above.

Finally, the test showing the infection must be the PCR test, and this in fact was done in our case on 8/30/21, less than 14 days after the applicant's last day at work on 8/21/21.

Therefore, the applicant qualifies for the presumption of industrial injury from her COVID-19 infection.

Next, the question becomes whether this presumption is rebutted.

Once the presumption is established, the burden shifts to the defendant to prove the non-existence of the presumed fact – here, that the infection came from work.

LC section 3212.87(e) states that the presumption may be rebutted by "other evidence." In the panel decision of **Sevillano v State of California 2022 Cal. Wrk. Comp. P.D. Lexis 255**, the board therein required the defendant to produce substantial evidence of COVID-19 infection from a source outside of work.

The facts in our case show that the applicant and her daughter developed symptoms at approximately the same point in time. The earliest for the applicant appears to be August 21st, when she experienced the symptom of severe exhaustion causing her to oversleep and be late for work.

For the daughter, symptoms developed shortly before August 22nd and the daughter tested positive for COVID-19 on 8/22/21 or 8/23/21 (Summary of Testimony, page 4: 24-25; Defendant's Exhibit F).

Thus, the two of them became symptomatic at about the same time, within a day or two of each other.

Several obvious questions arise from this timeline, all of which require substantial medical opinion to answer.

First, what is the normal expected incubation period for a COVID-19 infection, and is that period different for someone who has already had COVID at least once?

Is it different depending on age? In other words, is the latency period different for an adult versus a five year old child?

How can one distinguish, if a determination can in fact be made on these facts, which person infected whom? Can that be done to a reasonable medical probability?

To answer these questions, the parties used Dr. Scott Anderson as a PQME, and as defendant points out, there are problems with that doctor's opinions.

First and foremost, in the initial report, Dr. Anderson stated that when the applicant was at work doing job interviews, several co-workers were quite sick. This history turned out not to be true, and at trial the applicant testified that she had no idea where the doctor got that erroneous history.

This incorrect history was addressed in the doctor's deposition, but Dr. Anderson still was of the opinion that even if the applicant wasn't working with obviously sick co-workers, her infection most likely came from work, due to her job duties which required close work with the public.

When presented with the fact that the applicant's daughter also became ill with a COVID-19 infection at about this time (but presented to the doctor as having tested positive four days before the applicant – see page 25:12-20, Joint Exhibit BB), the evaluator still felt that the most likely source of applicant's infection was her job.

The evaluator asked to be provided with any medical records prior to the applicant's positive COVID test (page 23: 9-20, Joint Exhibit BB) to determine whether or not the applicant was infected by her daughter rather than from work exposure. These records, if any exist, were never provided, nor was the doctor informed if they do not exist.

Dr. Anderson did not provide any analysis of why the daughter should be or should not be considered the source of the applicant's COVID-19 infection.

The doctor was asked about the relevance of the applicant's subsequent history of two additional COVID-19 infections, but indicated he had not been told of that, and had seen no records, even though he felt they might be relevant to his opinions (page 27: 14-25; page 28: 1-9). There is no evidence that any of these records were provided to the doctor.

In summary, the PQME did not know about the applicants prior or subsequent COVID infections, and although he felt those records might be relevant, none were provided to him to consider, that we know of. The doctor was not asked to explain how it could be determined if the applicant was infected by her daughter rather than from work exposure, an especially important point given the two of them developed symptoms nearly simultaneously. The doctor did not provide a comprehensive analysis of why the applicant was more likely to have been infected at work, rather than via her daughter, other than the rather superficial statement that the multiple points of potential exposure at work were more convincing to him as a likely source.

Thus, the evaluator does not address the key question presented in any detail, and is missing certain records that he thought might be relevant to his analysis.

If the PQME's report is not substantial evidence, it does nothing to support the defendant's position that the presumption is rebutted.

If the PQME's report is substantial evidence, then it is evidence that the applicant's infection came from her work.

Neither supports the defendant's position that the presumption is rebutted.

Backing away from this and looking at the case from a broader perspective, it can be seen that although the employer witnesses testified that no Shasta County employee that they knew of was COVID positive in August of 2021, many of the applicant's contacts at work during the critical period were not Shasta County employees. Specifically, the applicant testified without contradiction that she interacted with about 40 other officers from around the state at the seminar in Sacramento, and then with about 16 candidates for employment with the county thereafter. By the time she began working the Dixie fire, she appears to have already begun to exhibit symptoms of her infection. Thus, there in fact were ample non-Shasta County employee work related contacts that could easily explain her infection, especially during the seminar when people from all over the state were gathered together in one place, interacting with each other at the seminar.

Consistent with the board's analysis in **Sevillano**, supra, the defendant needs to provide substantial medical evidence in support of their position that the applicant's infection, to a reasonable medical probability, came from her daughter, and not from her work.

The record is lacking in that substantial medical opinion.

The position that the applicant got her infection from the daughter is therefore speculative, especially when one considers that the evidence clearly establishes that they both began exhibiting symptoms at about the same time, and that no one at the daughter's day care was COVID positive during the critical month of August.

The inescapable conclusion here is that the presumption that the applicant acquired her COVID-19 infection has not been rebutted.

IS THE APPLICANT ENTITLED TO THE PRESUMPTION FOR PNEUMONIA PER LABOR CODE SECTION 3212.5?

Labor Code section 3212.5 establishes a pneumonia presumption if an investigator in a District Attorney's office, or Sheriff's Officer, develops pneumonia during a period when the person is in service to the District Attorney's office, as long as the person has served for five or more years in such capacity.

The applicant testified at trial, under oath, that she started as an investigator at the DA's office in 2019, but had worked as a Sheriff's Officer for ten years before that (Summary of Testimony, page 3: 19-23). This satisfies the service requirement of LC section 3212.5.

In Defendant's Exhibit B, the records of Mercy Medical Center, pages 1838 and 1839, the treating doctors determined that the applicant had a diagnosis of "acute COVID pneumonia," confirmed by X-Ray. This diagnosis was confirmed on the Mercy Discharge Summary dated 9/25/21, first page of Applicant's Exhibit 3, as well as acute respiratory failure and pneumomediastinum. On the second page of these records, it is noted that the applicant was admitted to the hospital with acute COVID-19 pneumonia.

Dr. Anderson was in agreement with this, noting on page 34 of Joint Exhibit AA that the applicant had acquired COVID-19 pneumonia, bilateral pneumothoraxes, pneumomediastinum and neuro-cognitive deficits secondary to hypoxemia.

There is no contrary medical evidence. The presumption of Labor Code section 3212.5 is therefore satisfied, and the applicant's COVID-19 related pneumonia can be presumed to arise out of and in the course of her employment with Shasta County.

Further, Dr. Anderson's statement that her neuro-cognitive deficits, which the applicant amply described in her trial testimony, were derivative of her hypoxemia, which in turn was caused by her COVID-19 infection. Therefore, in the absence of any contrary medical evidence, and since the applicant's COVID-19 infection is found to be presumed industrial, those neuro-cognitive deficits are also found to arise out of and in the course of the applicant's employment with the county.

DATE: 9/25/2023

Curt Swanson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE