

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

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

vs.

YARDI SYSTEMS; ONE BEACON INSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ10754584
Santa Barbara District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION
AND PETITION FOR DISQUALIFICATION¹**

Defendant seeks reconsideration, and disqualification of the workers' compensation judge ("WCJ"), in response to the Findings, Award and Order of October 31, 2022. In that decision, the WCJ admitted into evidence the September 28, 2018 medical report of Dr. Fischman, Panel Qualified Medical Evaluator ("PQME"), and the WCJ found that the injured employee, Randall Samalot ("decedent"), while employed as a project manager on September 21, 2016, sustained injury to his body arising out of and in the course of employment resulting in his death. The WCJ also found the decedent's death was caused by ingesting poppy seed tea and Kratom, which are immediate precursors to codeine and morphine as set forth in Health and Safety Code section 11007, with the latter two drugs listed as controlled substances under Health and Safety Code sections 110055(G) and 110055(L), and that defendant did not sustain its burden of proving the affirmative defenses of intoxication, suicide or material deviation.

In addition, the WCJ found that pursuant to Labor Code section 4702(a)(1), applicants Lauren Joyce and Genevieve Samalot are total dependents and are entitled to death benefits payable at the rate of \$1036.54 per week beginning September 21, 2016, totaling \$290,000.00, and that pursuant to Labor Code section 4703.5, applicant Genevieve Samalot is entitled to further

¹ Commissioner Deidra E. Lowe signed the Appeals Board's prior decision in this matter, the Opinion and Decision After Reconsideration dated March 24, 2022. Commissioner Lowe is no longer a member of the Appeals Board, so a new panel member has been substituted in her place.

death benefits payable at the rate of \$1036.54 per week until her eighteenth birthday. The WCJ also allowed applicants' attorney a reasonable fee of \$134,137.17, to be satisfied by commutation of the death benefits awarded by the WCJ.

Defendant contends that the decedent's death did not arise out of or occur in the course of employment, that the WCJ's findings do not support any causal connection between the employment and the injury, that the evidence demonstrates that the decedent's acquisition, manufacture, and ingestion of morphine, codeine, and mitrogynine causing his death was outside the "scope" of his employment, that the WCJ erred in not finding the decedent's death barred by the defense of intoxication under Labor Code section 3600(a)(4), that the WCJ erred in rejecting the affirmative defense of material deviation, that the WCJ erred in finding Lauren Joyce and Genevieve Samalot are both total dependents, and that the WCJ abused his powers and verbally showed bias favoring the applicants, thereby denying defendant due process and the opportunity to further develop the record and to be fairly and impartially heard on all issues.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report"), addressing both the Petition for Reconsideration and the Petition for Disqualification.

We have considered the allegations of defendant's Petition for Reconsideration and Petition for Disqualification, the contents of the WCJ's Report with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated below and in the WCJ's Report and Opinion on Decision, which are both adopted and incorporated herein, we will deny defendant's Petition for Reconsideration and Petition for Disqualification.

In denying defendant's petitions, 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.*)

We also reject certain contentions raised in defendant's petition for reconsideration that were not raised at trial on August 31, 2022, subsequent to our prior decision herein. In that decision, we noted that defendant had not raised Labor Code section 3600(a)(9) at trial, and that a defendant may not raise an issue for the first time on reconsideration that it did not raise at trial.

The trial minutes of August 31, 2022 show that defendant again made no effort to expressly raise Labor Code section 3600(a)(9).² Therefore, we reject defendant's reliance on section 3600(a)(9) and will not address it further.

We similarly reject defendant's contention that the WCJ erred in finding Lauren Joyce to be a total dependent. In our prior decision, we observed that at trial on September 27, 2019, defendant entered into an ambiguous stipulation that stated, "there is no issue of dependency as to either Laura Joyce or Genevieve Samalot." In our prior decision, we also stated that the WCJ should clarify the issue of dependency of both Lauren Joyce and Genevieve Samalot. However, our prior decision put defendant on notice that we questioned its ambiguous stipulation, so that it became prudent if not incumbent on defendant to clarify the issue even if the WCJ did not. However, the trial minutes of August 31, 2022 show that defendant did not raise an issue relevant to Lauren Joyce's dependency. Therefore, defendant's present attempt to contest the WCJ's finding of Lauren Joyce's total dependency is not well-taken. Furthermore, defendant's allegation that Lauren Joyce earned more than \$30,000.00 in the year before the decedent's death is not supported by specific reference to the record. This is a repeat violation of the WCAB's Rules of Practice and Procedure, defendant again having violated WCAB Rule 10945's requirement that "[e]very petition for reconsideration ... shall support its evidentiary statements by specific references to the record." (Cal. Code Regs., tit. 8, § 10945.)

Turning to defendant's contention that the WCJ erred in not finding the decedent's death barred by the defense of intoxication under Labor Code section 3600(a)(4), we note that the statute requires a showing that the injury is not caused by the unlawful use of a controlled substance. Kratom and poppy seeds are legal substances. (Exhibit X, Deposition of Devin Chase, pp. 18. & 22.) Officer Chase also testified that combining the two substances results in the production of morphine and codeine, which are controlled substances that can only be used legally by prescription. Otherwise, however, the preponderance of the evidence does not show that in making and ingesting poppy seed tea, the decedent was aware he was 'unlawfully using a controlled substance.' (Labor Code, § 3202.5.) Accordingly, in addition to the reasons stated by the WCJ in

² This statutory provision bars compensation for injury that "arise[s] out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment."

his Opinion on Decision and in his Report, we agree that defendant failed to meet its burden of proving the intoxication defense under section 3600(a)(4).

Defendant further contends that the decedent's death did not occur in the course of employment because his acquisition, manufacture, and ingestion of morphine, codeine and nitroglycine had no connection to his employment. (See *Latourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].) Specifically, defendant alleges that the decedent had the poppy seeds, Kratom and bottles of water delivered to the hotel room provided by his employer, in advance and in sufficient quantities, to create "his illicit concoctions outside of the view of his wife, co-workers and his supervisor, consuming same and overdosing as a result." (Petition for Reconsideration, 11:17-19.)

We are not persuaded. Defendant's allegations on this issue are founded upon speculation that the decedent secretly intended to abuse opiates in a hotel room furnished by his employer, before an important convention hosted by his employer the next day. The Board may not rely on speculation to support its decision. (*Glass v. Workers' Comp. Appeals Bd.* (1980) 105 Cal.App.3d 297 [45 Cal.Comp.Cases 441].) In order to entertain such speculation, moreover, it appears necessary to suppose the decedent made a bizarre choice of locations to engage in substance abuse – apparently under his employer's nose and open to being discovered the moment he stepped outside his room.

Based on our review of the record, we agree with the WCJ that the circumstances surrounding the decedent's death are more susceptible to a reasonable inference that the decedent procured the ingredients for poppy seed tea to relieve anxiety about performing well for his employer in making presentations about its software the next day. (See *Elliott v. Industrial Acci. Com.* (1942) 21 Cal.2d 281, 284, quoting *Dillard v. City of Los Angeles* (1942) 20 Cal.2d 599, 604: "The situation is not dissimilar to the case of an employee who suffers an injury in the course of his employment and takes what he believes to be medicine to relieve his condition temporarily, but the medicine turns out to be a deleterious substance and causes serious injury or death. Such injury or death may be said to have occurred in or arose out of his employment.")

Furthermore, we note the applicants need not "show that an inference in [their] favor is the only one that may be reasonably drawn from the evidence; [they] need only show that the material fact to be proved may logically and reasonably be inferred from the circumstantial evidence. [...] The mere fact that other [adverse] inferences...might be drawn does not render the [favorable]

inference too conjectural or speculative for consideration [by the trier-of-fact].” (See *Guerra v. Workers’ Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, 1309 [81 Cal.Comp.Cases 324], quoting *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 121, internal citations and internal quotation marks omitted.) In death cases, “[a]ll reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee.” (*Guerra, supra*, 246 Cal.App.4th at 1310, citing Lab. Code, § 3202 and *Clemmens v. Workmen’s Comp. App. Bd.* (1968) 261 Cal.App.2d 1, 8.)

Finally, we note that as part of its petition for reconsideration, defendant included a petition for disqualification of the WCJ. Defendant attached a sworn declaration by the employer’s corporate counsel, Wendy Kosche, who observed the trial of August 31, 2022 as the employer’s representative. Ms. Kosche alleges that before trial, the WCJ expressed an inclination to award benefits to the applicants (Kosche declaration, ¶ 4:11-23), and that the WCJ expressed a negative view about the proposed testimony of defense expert Devin Chase and that of Seth Giles, the decedent’s friend and co-worker. (Kosche declaration, ¶ 5:11-16 & ¶ 6:19-26.)

In his Report, the WCJ denies the latter allegation while noting that he admitted the testimony of Mr. Devin and Mr. Chase over the opposition’s objections. As for the former allegation, the WCJ suggests in his Report that Ms. Kosche’s allegation of bias or prejudice is based on the WCJ’s apparent exasperation over the parties’ inability to settle this case. This explanation for the basis of Ms. Kosche’s complaint is supported by the verified answer and declaration submitted by applicants’ attorney, who confirms the WCJ evidently urged the parties to settle. In this context, and based upon the WCJ’s Report and the opposing declarations of Ms. Kosche and applicants’ attorney, we are not persuaded the WCJ decided this matter based on bias or prejudice. We further observe that the petition for disqualification was untimely filed, i.e., more than ten days after the August 31, 2022 trial - when the alleged grounds for disqualification became known to the defendant. (Cal. Code Regs., tit. 8, § 10960.)³ We deny the petition for disqualification for this reason as well.

³ WCAB Rule 10960 provides, in relevant part: “If the workers’ compensation judge assigned to hear the matter and the grounds for disqualification are known, the petition for disqualification shall be filed not more than 10 days after service of notice of hearing or after grounds for disqualification are known.”

For the foregoing reasons,

IT IS ORDERED, that defendant's Petition for Reconsideration and Petition for Disqualification are **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 17, 2023

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

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

JTL/ara

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