WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

YURI MARKEVITCH, *Applicant*

vs.

HITACID GLOBAL STORAGE TECHNOLOGY;TOKIO MARINE and FIRE INSURANCE COMP ANY LTD, administered by BROADSPIRE, *Defendants*

Adjudication Number: ADJ8906863

San Jose District Office

OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report 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, which we adopt and incorporate, we will deny reconsideration.

The test for whether an injury is AOE/COE is well-established. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal. 4th 644 [63 Cal.Comp.Cases 253].)

First, the injury must occur "in the course of employment," which ordinarily "refers to the time, place, and circumstances under which the injury occurs." (*LaTourette, supra*, 63 Cal. Comp. Cases at p. 256.) An employee is acting within "the course of employment" when "he does those reasonable things which his contract with his employment expressly or impliedly permit him to do." (Ibid.) An employee necessarily acts within the "course of employment" when "performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied." (*Maher v. Workers' Comp. Appeals Bd*. (1983) 33 Cal. 3d 729 [190 Cal. Rptr. 904, 661 P.2d 1058, 48 Cal. Comp. Cases 326, 328].)

Second, the injury must "arise out of" the employment, "that is, occur by reason of a condition or incident of employment." *(Employers Mutual Liability Ins. Co. of Wisconsin v. I.A.C. (Gideon)* (1953) 41 Cal. 2d 676 [263 P.2d 4, 18 Cal. Comp. Cases 286, 288]. "[T]he employment

and the injury must be linked in some causal fashion," but such connection need not be the sole cause, it is sufficient if it is a "contributory cause." (*Maher, supra*, 48 Cal. Comp. Cases at page 329.)

In cases such as this one where the parties dispute whether employment contributed to an employee acquiring a communicable disease, the essential questions of when and where applicant contracted the disease may be unanswerable with any certainty. In those circumstances, the employee can establish industrial causation by demonstrating that it is more likely applicant acquired the disease at work or that the employment subjected the employee to a special risk of exposure in excess of that of the general population. (*Bethlehem Steel Co. v. Industrial Acc. Com*. (1943) 21 Cal. 2d 742 [135 P.2d 153, 8 Cal. Comp. Cases 61].)

In a Supreme Court case addressing an industrial injury caused by valley fever, the Court affirmed the Industrial Accident Commission's finding that a traveling salesman who contracted valley fever sustained an injury arising out of and in the course of his employment. (*Pacific Employers Ins. Co. v. Industrial Acc. Com. (Ehrhardt)* (1942) 19 Cal. 2d 622, 122 P.2d 570.) The Court responded to the argument that an applicant must prove that he was exposed to a special risk in excess of that of the general public in order establish that a disease arose out of employment.

> Petitioner argues, however, that even if it be assumed that the evidence established that Ehrhardt contracted the disease in the course of his employment, the application of the doctrine that an injury to be compensable must be in excess of and different from that to which the commonalty is subjected, requires an annulment of the award. It is unquestionably the law that an injury to be compensable under the Workmen's Compensation laws must arise out of the employment, that is, occur by reason of a risk or condition incident to the employment. There must be at least a causal connection between the employment and the injury; the mere fact alone that the injury occurred while the employee was in his master's service is not sufficient. (*Newton* v. *Industrial Acc. Com*., 204 Cal. 185 [267 Pac. 542, 60 A. L. R. 1279]; *Larson* v. *Industrial Acc. Com*., 193 Cal. 406 [224 Pac. 744]; *San Francisco* v. *Industrial Acc. Com., supra*.) However, there are other principles to be observed in aid of the application of the foregoing rules to the instant case. It is trite, but pertinent, to observe that the issue of whether the injury suffered arose out of a risk incident to the employment is a question of fact in each case and if there is any evidence or reasonable inferences flowing therefrom which support the finding of the commission, the award will not be disturbed on review. Each case must be decided upon its particular facts and no comprehensive

> formula is available. (*Larson* v. *Industrial Acc. Com., supra*.) The opinions of qualified medical witnesses with reference to the origin and cause of the injury are valid evidence which will support an award. (*Newton* v. *Industrial Acc. Com., supra; State Compensation Ins. Fund* v. *Industrial Acc. Com., supra*.) The injuries suffered to be compensable need not be of the kind anticipated by the employer or peculiar to the employment. (*Larson* v. *Industrial Acc. Com., supra*.) In the instant case we have the opinion of medical witnesses that Ehrhardt contracted the disease in the San Joaquin Valley while there in the service of his employer, and that the probability of his having contracted the disease elsewhere is very remote. (*Ehrhardt, supra* at 628-629.)

Similarly, in this case, it is the medical expert's opinion that applicant contracted a communicable disease on a business trip in China and the Philippines. Whether or not defendant anticipated exposure to a disease-causing agent as a risk of travel, applicant's exposure occurred during that travel. Given that we know when and where applicant contracted the disease, we do not need to reach the question of whether applicant's employment exposed him to risks greater than the general public. His travel exposed him to the disease and that is enough.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 17, 2023

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

YURI MARKEVITCH
BUTTS & JOHNSON
RTGR LAW LLP

MWH/mc

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

REPORT AND RECOMMENDATION ON

PETITION FOR RECONSIDERATION

I

INTRODUCTION

1. Applicant, Yuri Markevitch, while employed during the period 7/17/2012 through 8/4/2012 in a capacity remaining in dispute in various locations beginning and ending in San Jose California by Hitachi Global Storage, insured for worker's compensation liability by Tokio Marine Insurance, sustained an injury arising out of and in the course of this employment to his lungs and body systems in the form of Legionella Pneumonia as described in the medical reports admitted into evidence herein.

2. A Petition for Reconsideration has been filed by the Defendant. The Petition was timely filed, and verified in accordance with law. Applicant has filed an Answer.

3. Defendant seeks Reconsideration from a Findings and Award, which issued 12/5/2022/[2022], which found that Applicant's injury was legally compensable by application of the commercial traveler rule.

4. Defendant seeks Reconsideration based upon the contention that a different version of the 'commercial traveler rule' exists in the case of infectious diseases, and that the test Defendant has invented for these cases has not been met.

II

SUMMARY of FACT

The basic facts of this case are straightforward and uncontested. Petitioner has presented a summary of facts that fairly recites the agreed and uncontested facts, and this recitation is substantially complete and correct. What follows is a brief recapitulation.

The Applicant, Mr. Ma[t]kevitch, was directed by his employer to travel to the Far East (China and the Philippines, principally) in order to further his employer's business interests. While traveling on his employer's business, he contracted Legionnaire's disease. The available medical evidence indicates that the illness certainly came about as the result of exposure to the responsible pathogen during the course of the trip. The precise point of exposure is nearly impossible to know at this point, but the medical record indicates it was likely to have been one of the many hotels at

which he stayed on the trip. No evidence was presented to indicate that Applicant was exposed, or was likely to have been exposed, to this pathogen during the normal course of his personal life or normal work activities in Northern California.

Defendant denied injury and the matter came to trial before the undersigned on 10/17/2022. At trial, which went forward based upon a agreed statement of facts and without testimony, Defendant conceded (correctly, in my opinion) that no case law directly supported its contention that, whereas in all other 'commercial traveler' cases, coverage extended to virtually all of an employees' activities, and, while in this case there was no evidence that Applicant had engaged in none of the activities previously excluded from compensability by case law, Defendant claimed that infectious diseases were a separate class of injury and required application of a different rule. No case law was cited for this proposition, and Defendant admitted that Defense counsel's search for such case law agreed with the undersigned's search in finding no cases which supported such disparate treatment.

Accordingly, Findings and Award were issued on 12/5/2023 which found injury AOE/COE and Awarded medical care, deferring all other benefits and claims. From this Findings and Award, Reconsideration has been sought.

III

DISCUSSION

The defense of this case is based upon a distorted reading of two valid and binding cases. The first case is *Bethlehem Steel v. IAC*, a 1943 case whose reasoning is quite sound. As quoted by Defendant under heading II of the Petition (the pages of the Petition are not numbered), Bethlehem Steel is not a commercial traveler case. It requires the Applicant to prove that the disease was contracted because of his employment (this point is apparently conceded and is fully supported by the medical evidence) and also that "the disease contracted was not merely a hazard of the community, but that the employee was subjected to some special exposure in excess of that of the community". Applicant amply meets this test under these facts. There is no evidence that the general public in Northern California, where Applicant lived and worked, was exposed to any risk of Legionnaire's disease at all. On the other hand, we know that Applicant was exposed to such a risk during his travels on behalf of the employer. But for the trip, any such exposure is extremely unlikely and extremely speculative. I do not believe that the *Bethlehem* court intended

in any way to include the populations of China and the Philippines in its definition of 'the general public. Travel to foreign countries carries an inherent risk of exposure to diseases not prevalent in California. In this case, that risk materialized, to the injury of Applicant.

Defendant also relies on the more recent case of *LaTourette v. WCAB*. That case may be easily distinguished on its facts. *LaTourette* involved heart disease, which afflicted the injured worker long before he left on his trip and which only coincidentally manifested itself during the course of his employment. *LaTourette* did not involve an infectious disease and the heart disease was not contracted during the trip. Here, on the other hand, the case *does* involve infectious disease and was contracted due to an exposure while in the course of Applicant's employment. I do not believe that *LaTourette* has anything in particular to say about the result in the instant case.

Based upon misreading of these two cases, Defendant insists on the existence of a special rule in commercial traveler cases where infectious disease is involved. No case law supports this conclusion. It is difficult to understand why Defendant felt that such a weak and convoluted position justified *ad hominem* directed towards the WCJ in its Petition.

IV

RECOMMENDATION

DENY Reconsideration.

David L. Lauerman,
Workers' Compensation Judge

Filed and served by Mail on 01/10/2023
All parties on the Official Address Record
By: OMartinez

PROOF OF SERVICE

OFFICIAL ADDRESS RECORD

Case Number: ADJ8906863

ARMSTRONG FIRM SAN JOSE
BROADSPIRE CONCORD
BROADSPIRE SACRAMENTO
BUTTS JOHNSON SAN JOSE
CIGNA GROUP INSURANCE
HITACHI
NY LIFE INSURANCE DALLAS
PRAXIS DISABILITY CONSULTING BEVERLY
RTGR LAW OAKLAND
YURI MARKEVITCH