

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

ERNEST SANCHEZ, *Applicant*

vs.

STATE OF CALIFORNIA, *Legally Uninsured, Defendant*

**Adjudication Number: ADJ12021219
Bakersfield District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of March 3, 2023, wherein it was found that, while employed as a correctional officer on January 26, 2019, applicant did not sustain industrial injury to the respiratory system and musculoskeletal system in the form of coccidioidomycosis, commonly known as valley fever. The WCJ thus ordered that applicant take nothing by way of his workers' compensation claim. In a Findings and Order of March 30, 2021, the WCJ had previously found that applicant's valley fever was not industrial. However, in an Opinion and Decision After Reconsideration of June 18, 2021, we¹ rescinded the March 30, 2021 decision and returned the matter for further development of the record and analysis to determine the applicability of Labor Code section 3212.10, which, as relevant to this case, creates a rebuttable presumption of industrial causation when a correctional officer develops or manifests pneumonia during his or her service. The presumption had not been considered by the parties and the WCJ in the proceedings leading up to the March 30, 2021 decision.

Applicant contends that the WCJ erred in not finding industrial injury in the form of valley fever. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

¹ Since the issuance of our June 18, 2021 decision, Commissioners Deidra Lowe and Marguerite Sweeney, who were panelists in this matter, have retired from the Appeals Board. Commissioner Joseph V. Capurro and Deputy Commissioner Anne Schmitz have been substituted in their place.

As explained below, we will grant reconsideration, rescind the WCJ's decision and issue a new decision reflecting that applicant sustained presumptive industrial injury in the form of coccidioidomycosis.

As relevant to the instant proceedings, Labor Code section 3212.10 states:

In the case of a peace officer of the Department of Corrections who has custodial or supervisory duties of inmates or parolees ... the term "injury" as used in this division includes ... pneumonia, ... that develops or manifests itself during a period in which any peace officer covered under this section is in the service of the department or unit. The compensation that is awarded for that injury shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits as provided by the provisions of this division.

The ... pneumonia ... so developing or manifesting itself shall be presumed to arise out of and in the course of employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

Given previous cases in which valley fever has been found to constitute pneumonia (see generally *Lee v. State of California* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 543 [Appeals Bd. panel]; *Thomas v. State of California* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 62 [Appeals Bd. panel]), we returned this matter to the trial level so that the applicability of Labor Code section 3212.10 could be considered.

The record was developed with two short supplemental reports from qualified medical evaluator Jeffery M. Freesemann, M.D. The first read:

The unfortunate correction officer, Ernest Sanchez, who is a very nice gentleman and was very pleasant to talk to, was very forthcoming in his QME Report that I have already submitted, and I have been asked to reconsider given that the matter went to trial, and it was adverse to the applicant, and the applicant exercised his right to petition reconsideration.

I am very familiar with the case of Police Officers Department of Corrections who has custodial supervisor duties can develop pneumonia, heart trouble, tuberculosis, meningitis, and is presumed to be a rise of [sic], and in the course of employment, including some cases that some people were entitled to the presumption of Valley Fever as has been identified as in pneumonia. However, as detailed in my QME, the reason that the labor code presumption 3212.10

presumption did not apply in Mr. Sanchez's case was that he lived in a hyperendemic area, in which, my QME gave a rebuttal to the presumption of the pneumonia due to the fact that he lived in a hyperendemic area, and by several studies by the CDC with prisons in the Valley, that is impossible to determine the causation at this point of Valley Fever, in the Valley, in a hyperendemic area. In other words, Mr. Sanchez could have contracted Valley Fever at any number of areas where he lived. Beyond that, there are other medical factors in play that I believe caused the patient's significant symptoms and significant hospital stays, but I am not at liberty to discuss due to HIPPA laws. However, I do think those things did contribute to his long illness.

However, besides that point, given your question was whether or not I would change my QME Report based on your letter citing one case in Lee Vs. State Vs. California Department of Corrections and Rehabilitation Pleasant Valley state prison, I do not change my opinion given the fact that the patient lives in the very epicenter of a hyperendemic area of Valley Fever, and there was not enough substantial medical evidence to support within reasonable medical probability that this was a work injury.

(August 23, 2021 report at pp. 1-2.)

A second report responded to counsel's questions:

- 1) If the pneumonia presumption does apply to this applicant, is it your opinion that the presumption is rebutted? Yes it is, is my answer.
- 2) If it is your opinion the contemporaneous nonwork-related exposure was sole cause of the Valley Fever? The patient had other medical problems that may have also contributed to his Valley Fever; however, as I opined in both the Supplemental Reports and in my QME Report of 06/19/20219, the patient lives in a hyperepidemic area of Valley Fever, in which, multiple studies have shown that, in this type of area, the presumption of pneumonia found work related is impossible to determine and that the presumption is rebutted given that he does live in a hyperepidemic area in which he could have caught Valley Fever at any place in the Valley region.

Labor Code section 3212.10 creates a presumption affecting the burden of proof that an injury under its ambit arose out of and in the course of employment. Ordinarily, the applicant for workers' compensation benefits has the burden of proving industrial causation. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.App.4th 644, 650 [63 Cal.Comp.Cases 253] citing *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660]) However, "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." (Evid.

Code, § 606.) Labor Code section 3212.10 thus shifts the burden of proof on to the employer to show that an injury did not arise out of and in the course of employment.

Here both the QME and the WCJ appear to find that the presumption was established but conclude that it was rebutted. However, Dr. Freeseemann never states, let alone provides substantial medical evidence, that applicant's valley fever was probably not contracted at work. Rather, he states that the cause of the injury is "impossible to determine." Defendant thus did not meet its burden of overcoming the statutory presumption.

We will therefore grant reconsideration, rescind the WCJ's decision, and issue a new decision reflecting that applicant sustained presumptive industrial injury in the form of coccidioidomycosis.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Order of March 3, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of March 3, 2023 is **RESCINDED** and that this matter is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Ernest Sanchez, age 41 on the date of injury, while employed on 1-26-2019 as a correctional officer, Occupational Group 490, at Delano, California, by the State of California, sustained injury arising out of and in the course of employment to the in the form of coccidioidomycosis.
2. Applicant's injury is subject to the pneumonia presumption codified at Labor Code section 3212.10, and defendant did not successfully rebut the presumption.
3. All other issues are deferred, with jurisdiction reserved.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 22, 2023

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

**ERNEST SANCHEZ
BERRY, SMITH & BARTELL
STATE COMPENSATION INSURANCE FUND**

DW/oo

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