

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

**SOFIA SEVILLANO, *Applicant***

**vs.**

**STATE OF CALIFORNIA, IHSS, LEGALLY UNINSURED;  
ADMINISTERED BY YORK RISK SERVICES GROUP, A SEDGWICK COMPANY,  
*Defendants***

**Adjudication Number: ADJ13511723  
San Bernardino District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

Defendant State of California/IHSS seeks reconsideration of our September 28, 2022 Opinion and Decision After Reconsideration, wherein we rescinded the August 5, 2021 Findings and Order of the Workers' Compensation Administrative Law Judge (WCJ), and substituted new Findings of Fact that the presumption of industrial causation of Labor Code section 3212.86 applied, that the defendant had not rebutted that presumption, and that applicant sustained injury arising out of and in the course of employment in the form of COVID-19-related illness, and to her lungs in the form of pneumonia.<sup>1</sup>

We have not received an Answer from any party.

We have considered the Petition for Reconsideration, and we have reviewed the record in this matter. For the reasons discussed below, we will deny the petition.

A petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice..." (*Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shiple*, the Appeals Board denied the applicant's petition for

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<sup>1</sup> Commissioner Sweeney, who was previously on this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision, holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, we issued the Opinion and Decision After Reconsideration (ODAR) on September 28, 2022, and defendant filed a timely petition on October 24, 2022. Thereafter, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. Therefore, considering that defendant filed a timely petition and that the Appeals Board's failure to act on that petition was in error, we find that our time to act on defendant's petition was tolled.

Defendant contends that our decision appears to be based on an incorrect evidentiary standard with respect to the defendant's burden of proof. In our September 28, 2022 ODAR, we observed that the presumption of Labor Code section 3212.86 could be overcome by "other evidence," and that once the facts giving rise to the presumption of industrial injury have been proven at the outset, the burden of proof negating the presumption falls upon the employer. (Lab. Code, § 3212.86(e); *Gillette v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 312 [36 Cal.Comp.Cases 570].) Applying this metric, we determined that defendant offered "no substantial evidence that applicant was infected with the COVID-19 virus," outside of her workplace. (ODAR, p. 6, para. 3.) Defendant avers that notwithstanding our direct citation to the burden of proof as set forth in the statute, we "seem to interject an evidentiary standard that is not imposed by the plain language of the statute itself." (Petition, at 4:26.) Defendant refers us to another COVID-19 presumption statute, Labor Code section 3212.88,<sup>2</sup> wherein the presumption of industrial causation may be overcome by evidence of measures in place to reduce potential transmission of COVID-19, as well as the employee's non-occupational risks of COVID-19 infection. (Lab. Code, § 3212.88(e)(2); Petition, at 5:13.)

We agree that the rebuttal standard of "other evidence" set forth in section 3212.86(e) allows for a broad range of evidence, and that such evidence may include factors such as those described in section 3212.88, including measures taken to reduce potential transmission, and non-occupational risk factors. However, we also observe that once the presumption of section 3212.86

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<sup>2</sup> All further statutory references are to the Labor Code unless otherwise stated.

attaches, defendant bears the *affirmative* burden of rebutting that presumption with such “other evidence” as may be relevant.

Defendant asserts that it has sustained its affirmative burden of proof in part because applicant wore a mask at all times. (Petition, at 5:23.) However, as the Petition also observes, the elderly couple for whom applicant worked did not always wear masks, and applicant noted that she regularly came into close contact with her employers, including driving one or both of them to the market 3-4 times each week. (Ex. 3, report of Ronald Zlotolow, M.D., dated September 8, 2020, at p. 2.) Defendant offers no evidence regarding the type of masks worn by applicant, or medical or scientific evidence discussing the relative protection offered by mask, gloves, or other personal protective equipment employed in situations involving repeated close interpersonal contact.

Defendant further contends that there is no evidence the couple for whom applicant worked were actually infected with COVID-19. (Petition, at 6:5.) However, this argument misapprehends the nature of a presumption, which presumes industrial causation, subject to an affirmative rebuttal by the defendant. It is presumed that applicant’s COVID-19-related illness was caused by work exposures, and unless the presumption is controverted, the WCAB is bound to find in accordance with the presumption. (Lab. Code, § 3212.86(e).) The operation of the presumption relieves applicant of the burden of affirmatively establishing that her employers tested positive for COVID-19.

Defendant avers that the applicant advised the hospital staff her roommates were ill with COVID-19, and that their illness is independently corroborated in the records of San Antonio Regional Hospital. (Petition, at 6:10.) Defendant avers that when a social worker contacted applicant’s housemate Mr. Martinez, he informed the social worker that he and his wife “had been ill recently and that he was also ill.” (Petition, at 6:20.) However, the July 8, 2020 records of San Antonio Regional Hospital state:

SW [social worker] contacted pt over the phone. She was alert and oriented x4 and able to communicate her needs. Pt stated that she rents a room. However, her landlord has decided not to have Pt in the room anymore and has offered his garage, which has a bathroom and air conditioner. Pt stated not understanding the reason why she needs to go to the garage...She asked SW to contact her landlord, Horacio Martinez...SW contacted Horacio, who reports that he has offered his garage, which has been converted in living qua[r]ters. It has an air conditioner, bathroom and a bedroom area. He stated that his wife was ill

recently and he's afraid of contacting the Covid as he was also ill. (Ex. B, records of San Antonio Regional Hospital, various dates, p. 182.)

The hospital records indicate that when a social worker contacted applicant's housemates at the end of her multi-day hospitalization, applicant's housemates sought to move applicant's living quarters to a converted garage for fear of contracting COVID-19. Defendant's Petition repeatedly refers to the fact that applicant's housemates were "ill," but does not mention their proactive efforts to limit their risk of *contracting* COVID-19. We therefore find unpersuasive defendant's argument that the "illness" described by applicant's housemates was the very condition they sought to avoid, or that this evidence supports defendant's assertion that applicant's housemates were the source of applicant's COVID-19 infection.

Finally, defendant avers that the credibility of a witness is paramount, and that "[i]f the Board finds that an applicant is not credible, particularly on issues critical to the claim, it may find that he or she has not met the burden of proving a compensable injury." (Petition, at 8:7.) However, we note that the legal authority cited by defendant in support of this statement uniformly involves credibility determinations otherwise supported by solid, credible evidence in the record, and that none of the cases cited involve the application of a presumption of injury. (Petition, at 8:11, citing *Los Angeles Unified School District v. Workers' Comp. Appeals Bd. (Henry)* (1981) 46 Cal.Comp.Cases 94; *Nash v. Workers' Comp. Appeals Bd.* (1994) 59 Cal.Comp.Cases 324; *Alvarez v. Workers' Comp. Appeals Bd.* (1997) 62 Cal.Comp.Cases 677 (writ denied); *Carroll v. Workers' Comp. Appeals Bd.* (1973) 38 Cal.Comp.Cases 81 (writ denied); *Flusher v. Workers' Comp. Appeals Bd.* (1966) 31 Cal.Comp.Cases 199 (writ denied).)

Here, there is no dispute that the presumption of industrial injury described in section 3212.86 attaches. (Petition, at 7:8.) Defendant bears the affirmative burden of controverting this presumption with "other evidence." (Lab. Code, § 3212.86(e).) Following our review of the record occasioned by the defendant's Petition, and for the reasons discussed above, we continue to believe that defendant has not met its affirmative burden of overcoming the presumption of industrial causation.

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**March 29, 2023**

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

**SOFIA SEVILLANO  
THE DOMINGUEZ FIRM  
LAW OFFICES OF BRADFORD & BARTHEL**

**SAR/abs**

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