WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NANCY GALLEGOS, *Applicant*

vs.

THE DOUGHERTY COMPANY; PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD, *Defendants*

Adjudication Number: ADJ14125842
Van Nuys 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, and for the reasons stated below, we will deny reconsideration.

Labor Code[1] section 3600(a) provides that workers' compensation liability "shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment..." (Lab. Code, § 3600(a).) The California Supreme Court has explained that it is the applicant's burden to establish that industrial causation is reasonably probable. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd*. (2015) 61 Cal.4th 291, 297 [80 Cal.Comp.Cases 489].) The concept of "in the course of employment" "ordinarily refers to the time, place, and circumstances under which the injury occurs." For an injury to "arise out of" the employment, "... it must 'occur by reason of a condition or incident of [the] employment.' ..." [Citation.] That is, the employment and the injury must be linked in some causal fashion. (Citations.)" The section 3600 proximate cause requirement "'has been interpreted as merely elaborating on the general requirement that the injury arise out of the employment.' [Citation.] The danger from which the employee's injury results must be one to which he was

[1] All further statutory references are to the Labor Code, unless otherwise noted.

exposed in his employment. [Citation.] 'All that is required is that the employment be one of the contributing causes without which the injury would not have occurred.' [Citations.]" (*Ibid* at 297-298.)

The Supreme Court had previously stated that:

> [I]n the area of nonoccupational disease, '[t]he fact that an employee contracts a disease while employed or becomes disabled from the natural progress of a nonindustrial disease during employment will not establish the causal connection.' The narrower rule applicable to infectious diseases arises from the obvious problems of determining causation when the source of injury is of uncertain etiology, the product of invisible and often widespread viral, bacterial, or other pathological organisms. The potentially high costs of avoidance and treatment for infection diseases, coupled with the fact that such illnesses often cannot be shown with certainty to have resulted from exposure in the workplace, also explain the different line-drawing by our courts in the area of nonoccupational disease.
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> (*La Tourette v. Workers' Comp. Appeals Bd*. (1998) 17 Cal.4th 644, 654 [63 Cal.Comp.Cases 253, 258 - 259] citations omitted.)

Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Compensation Appeals Board, Mcdonnell-Douglas Aircraft Company*, et al., (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) Here, for the reasons stated in the Report, we agree that the WCJ properly relied on the record, including the substantial opinions of panel qualified medical examiner (PQME) Yima Yavari, M.D., and treating physician Ronald Zlotolow, M.D., to find that applicant met her burden of proof. (Dr. Yavari's report, 1/6/22, at p. 35, Court Exhibit X & Dr. Zlotolow's report, 4/8/2, applicant's Exhibit 10.)

Finally, 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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 12, 2023

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

NANCY GALLEGOS
ZAPANTA ALDER LAW
LYDIA NEWCOMB

PAG/*pc*

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

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

CASE NUMBERS: ADJ14125842

NANCY GALLEGOS,

vs

THE DOUGHERTY COMPANY; PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD;

WORKERS' COMPENSATION JUDGE: DIANE BANCROFT

DATE: April 26, 2023

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

1. **Applicant's occupation:** Account Manager for an insurance firm
2. **Applicant's age at dates of injury:** 46
3. **Dates of injury:** 11/17/2020
4. **Parts of body injured:** COVID
5. **Identity of petitioner:** Defendant
6. **Timeliness:** Yes
7. **Verified:** Yes
8. **Answer Filed:** Not at this time
9. **Date of Action:** Findings of Fact dated 3/23/2023 at AOE/COE trial
10. **The petitioner's contentions:** that the undersigned acted without or in excess of its powers; the evidence does not justify the findings of fact; the findings of fact do not support the order, decision or award; AND

1. Defendant contends that WCJ erred by failing to address and apply the narrow rule of compensability applicable to infectious diseases as outlined by the CA Supreme Court in *LaTourette*; a the applicant failed to prove that COVID 19 is an occupational illness per CA Labor Code section 6409(b); b. traditional "positional risk" theory applied by WCJ Bancroft does not apply to non-occupational diseases; 2. Defendants contend WCJ erred in not addressing Applicant's failure to prove either exception to the non-occupational bar under *La Tourette* and/or failed to apply the law correctly. a. The Applicant does not satisfy the requirement of the increased risk standard for evaluating the

compensability of the claimed COVID-19 illness (a non-occupational disease) by a preponderance of the evidence. b. There is no evidence of intervening human agency or instrumentality on the part of the employer.

II.
FACTS

Applicant, Nancy Gallegos, was employed as an account manager by defendant, the Dougherty Company, an insurance firm that handled workers compensation coverage. The applicant was employed for less than two weeks when she was diagnosed with COVID 19 and suffered devastating consequences. At trial, the applicant and a defense witness, Linda Freelin, defendant's former office manager, testified over LifeSize.

The applicant testified that she worked in person at an open workstation in a nine person office for defendant beginning 11/02/2020. Applicant's last date of work was 11/16/2020. On that date, defense witness, office manager, Linda Freelin, called the applicant into her office and told her to put a mask on and get tested for COVID. That was the first time the applicant heard that her co-worker Shirleen had tested positive. Shirleen was the only other coworker that had an open workstation and they were the only ones that tested positive for COVID. Everyone else had an enclosed office with a door and window in the 5000 square foot space. Shirleen had been on vacation in Utah with her daughter and grandson who had been exposed at school and then returned to work as the receptionist.

The applicant said that on 11/02/2020 defendant had no COVID protocols in place for employees. Defense witness claimed that there were signs in the lunchroom and that everyone knew not to come in if they were sick. Further, they had masks, sanitizer and Lysol.

Another employee of defendant, Charity, trained the applicant and she was told that one of them could wear a mask if they wanted. No other instructions were given other than that. Applicant stated that there were no rules with respect to social distancing, sanitation protocols and instructions on what to do if anyone was ill or experiencing symptoms.

On 11/10/2020, Shirleen returned from vacation visiting her family. Shirleen had COVID symptoms as she was coughing, sneezing, and blowing her nose and looked unwell. As a result, Shirleen left early, i.e. probably half a day, but she was not sure. On that day, the applicant had contact with Shirleen and had to reach to grab boxes of materials from under Shirleen's desk to be shredded in the back. The applicant also had a conversation with Shirleen that day. Further contact that day was "in passing" as applicant's desk was unavoidable because applicant was stationed near the restroom and break rooms

which were high traffic areas. The applicant herself had no COVID symptoms that day.

On 11/12/2020, the applicant was told that Shirleen went home because of allergies. Shirleen was not sent home, but went home early that morning according to the applicant. Mr. Dougherty was told by the applicant of her concerns regarding exposing her mother. Defense witness thought everyone knew that Shirleen went home because she was sick as it was a small office thereby contradicting her testimony that everyone knew that Shirleen had allergies. Applicant recalled at least three encounters with Shirleen – one lasting one minute, another day she worked at her desk for five minutes and another in passing for a few minutes.

On 11/13/2020, Shirleen called in and said her allergies were not improving and she was not well like she had a cold. Defense witness was unconcerned about COVID until she received a call from Shirleen after 5:00 pm notifying her that Shirleen's daughter and her grandson were exposed in Utah at school and that Shirleen needed to be tested. Defense witness notified applicant's co-workers of Shirleen's COVID exposure. Applicant was not notified because defense witness said she did not have her number with her.

Defense witness said they had COVID protocols and denied telling the applicant not to wear a mask. A visibly sick Shirleen did not wear a mask. Applicant was told that during training only one of them should wear a mask. Applicant was trained by Charity. Defense witness claimed that Shirleen had allergies regularly i.e. she sneezed, had runny eyes and a cough off and on. Defense witness' testimony was contradictory with respect to Shirleen's illness and the office's COVID protocols. Defense witness said that everyone knew not to come in if they were sick, but Charleen kept showing up until she was too ill to come in on Friday, the 13th.

On 11/14/2020 Shirleen got tested and the results would be available on 11/17/2020.

On 11/15/2020, applicant visited her mother, father and stepmother.

On 11/16/2020, applicant returned to work and stated that defense witness was frantic because they had no COVID protocols in place and met with Mr. Dougherty for 30 minutes. Thereafter, everyone was told to get tested. The employer did not offer testing so the applicant went to urgent care. On 11/16/2020, the applicant had a slight cough. Thereafter, the office was sanitized and daily temperature checks were in place for all employees when they came in to work (Applicant's Exhibits 1 & 7).

Two weeks prior to 11/16/2020, applicant resided in Long Beach with her husband and daughter in an apartment with a common elevator. No one was

exposed to COVID that she was aware of and they took precautions in her home, i.e. her husband worked remotely, her daughter was in school on line and they wore masks and sanitized. The applicant said she did not wear a mask at home, but did wear a mask in the elevator. She was told it was safe to be at work without a mask as they were a small company and so she did not wear one as she did not want to be the only one wearing a mask. The emails are clear that show that the applicant was excited to start a new job with defendant. Defense witness told the applicant that they did not have to wear a mask, but denied that statement. Defense witness did not appear credible.

On 11/17/2020, applicant received a positive test for COVID. On that date, the applicant experienced symptoms that day in the form of a fever.

Applicant's family tested positive that Thursday or Friday after the applicant tested positive, i.e. 11/19/2020 or 11/20/2020.

In emails with Dougherty, Mr. Dougherty told her that she got COVID from Shirleen because he saw them in close contact with one another. Dougherty was upset that the company did not meet the criteria for an outbreak (Applicant's Exhibits 5 & 6). Defendant's insurance carrier denied the case as the applicant contracted COVID from Shirleen who contracted COVID outside of work (Applicant's 4).

Both medical reports in this case found industrial injury. Dr. Zlotolow (Applicant's Exhibit 10) found industrial causation of COVID 19 based on contact tracing that the applicant gave the disease to her family and industrial exposure from Shirleen, her co-worker (*Id*. at p. 5). The history states the applicant wore a mask the first day of her new job and not afterwards as no one else wore them. Everyone had to pass by applicant's desk to go to the break room or bathroom (*Id*. at p. 3). The applicant did not go out without a mask and avoided large groups (*Id*. at p. 3).

The PQME, Dr. Yima Yavari (Court Exhibit X) – stated that with reasonable medical probability the applicant contracted COVID as a result of her employment due to the increased risk of exposure as a result of her infected coworker and the "carefree approach of the employer in protecting its employees" (*Id.* at p. 35).

III.
DISCUSSION

1. **1. Defendant contends that WCJ erred by failing to address and apply the narrow rule of compensability applicable to infectious diseases as outlined by the CA Supreme Court in *LaTourette*; a the applicant failed to prove that COVID 19 is an occupational illness per CA Labor Code**

section 6409(b); b. traditional "positional risk" theory applied by WCJ Bancroft does not apply to non-occupational diseases;

2. Defendants contend WCJ erred in not addressing Applicant's failure to prove either exception to the non-occupational bar under *La Tourette* and/or failed to apply the law correctly. a. The Applicant does not satisfy the requirement of the increased risk standard for evaluating the compensability of the claimed COVID-19 illness (a non-occupational disease) by a preponderance of the evidence. b. There is no evidence of intervening human agency or instrumentality on the part of the employer

Defendant's assertions overlap and revolve around the *LaTourette* decision and has such they will be addressed together. Defendant asserts that the undersigned's decision to find applicant's COVID 19 infection AOE/COE is incorrect based upon the law and the evidence.

At the outset, the strict application of the COVID 19 presumptions, do not inure to the benefit of this applicant. Labor Code section 3212.86 applies to an earlier time frame from March to July 2020; Labor Code section 3212.87 applies to front-line workers and, finally, Labor Code section 3212.88 applies to employers of more than 5 employees and if under 99 employees, 4 employees must test positive within 14 days. However, even if applicant does not have the benefit of a presumption, it does not negate the opportunity to prove injury.

LaTourette does not bar applicant's injury either. In *LaTourette*, the decedent was on a business trip as a commercial traveler and had a heart condition that he sought treatment for. LaTourette was treated at a hospital in Reno and contracted a bacterial infection and died. The widow did not recover as no greater risk was demonstrated on the facts, i.e. the widow could not show that the decedent was exposed to a special risk of infection or other medical injury because of his employment. The widow merely asserted that it was possible and an award cannot be based upon surmise or conjecture.

In applicant's case, there was reasonable medical probability that COVID was contracted at work through the conduit of Shirleen. In this case, the medical evidence from the PTP and PQME supports this from the contact tracing and the exposure as well as the employer's "carefree" attitude. Defense witness was not credible and contradicted herself. Applicant was credible in her recitation of the laissez-faire attitude that her employer had with COVID protocols at the height of the pandemic. Applicant was a new employee and it is understandable that she would follow the lead of defense witness and not feel she had to wear a mask as she wanted to fit in. Shirleen - a visibly sick employee – showed up three days in a row and was allowed to work at an open workstation near the front door after returning from vacation and continued working until she ultimately

called in sick on the 4th day. Shirleen was never told to get tested or put on a mask nor was she sent home.

Applicant was one of two employees with an open workstation and was in a "high traffic" area. Despite defense witness' testimony that masks, Lysol and hand sanitizer were available to employees, defendants' inaction speaks louder than words. Shirleen returned from an out-of-state trip without requiring a negative COVID test upon her return and continued to work even though she said she did not feel well.

As stated in the Opinion, "Shirleen's symptoms occurred during a period when a cough, sneezing and runny eyes would have set off alarm bells for the general public. Therefore, a reasonable employer would have immediately sent Shirleen home. In addition, applicant's employer should have undertaken daily temperature checks before their employees were exposed to COVID and should have required that Shirleen get tested as she exhibited classic COVID symptoms however no test kits were at their premises. A reasonable employer would not have allowed a visibly sick Shirleen to continue to work until she returned with proof of a negative COVID test. Further, the office should have been sanitized on 11/10/2020 – the minute Shirleen returned from vacation with COVID symptoms. Defense witness did none of those things and further did not even make sure that a coughing employee – Shirleen - wear a mask as defense witness testified that Shirleen did not wear a mask. Both Shirleen and the applicant worked at open workstations. All the other employees who tested negative were behind closed doors. In addition, to advise the applicant who was a new employee that Shirleen's symptoms emanated from mere allergies during a pandemic is "gaslighting" at the very least and irresponsible behavior on the part of the employer during a pandemic." (Opinion on Decision dated 3/23/2023)

Defendant denied the case and asserted that because Shirleen got COVID outside of work, applicant did not get COVID at work. This is nonsensical and has no impact on applicant's case. Defendant's conduct placed the applicant at a higher risk than the general public of getting COVID. In *La Tourette* the narrower rule applying to infectious diseases arose from the obvious problem of determining causation when the etiology is unclear. Here the etiology is clear – "new Nancy" was subjected to COVID from "sick Shirleen". Thus, the facts of this case, are not on point with *LaTourette* as there is probability and not possibility based upon the evidence.

RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be denied.

Dated: April 26, 2023

DIANE BANCROFT
Workers' Compensation Administrative Law Judge