WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CARLOS VALENCIA (Deceased); GLORIA VALENCIA; CELIA VALENCIA, Individually and as Guardian Ad Litem for KARINA VALENCIA, *Applicants*

vs.

OAKLAND UNIFIED SCHOOL DISTRICT, Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ11292351
Oakland District Office

OPINION AND ORDERS DENYING PETITIONS FOR RECONSIDERATION

Applicant and Defendant each seek reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of November 3, 2023, wherein it was found that while employed during a cumulative period ending December 24, 2017, decedent sustained industrial injury to his lungs leading to his death. Although the WCJ found industrial injury, it was found that decedent was not entitled to any statutory presumption of pneumonia for certain specified public safety workers. (Lab. Code, § 3212 et seq.) It was found that widow Gloria Valencia was decedent's total dependent at the time of injury, and that his daughter Celia and granddaughter Karina were partial dependents.

Defendant contends in its Petition that the WCJ erred in finding industrial injury. Applicants contend in their Petition that the WCJ erred in not finding applicant entitled to a statutory presumption of pneumonia injury, and in not finding granddaughter Karina to be a total dependent. We have received an Answer from applicants to defendant's Petition, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated below with regard to the applicants' contention regarding applying a statutory presumption of injury, and for the reasons stated in the WCJ's Report which we adopt incorporate and quote below with regard to defendant's Petition and applicants' contention regarding the extent of granddaughter Karina's dependency, we will deny both Petitions.

Applicants argue that Labor Code section 3212 confers a statutory presumption of pneumonia injury upon decedent. Labor Code section 3212 states, in pertinent part:

> *In the case of* ***members of a sheriff's office or the California Highway Patrol****,* ***district attorney's staff of inspectors and investigators*** *or of* ***police or fire departments of cities, counties, cities and counties, districts or other public or municipal corporations or political subdivisions****, whether those members are volunteer, partly paid, or fully paid, and in the case of* ***active firefighting members of the Department of Forestry and Fire Protection*** *whose duties require firefighting or of any county forestry or firefighting department or unit, whether voluntary, fully paid, or partly paid, and in the case of* ***members of the warden service of the Wildlife Protection Branch of the Department of Fish and Game*** *whose principal duties consist of active law enforcement service, excepting those whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement service such as stenographers, telephone operators, and other officeworkers, the term "injury" as used in this act includes* ***hernia*** *when any part of the hernia develops or manifests itself during a period while the member is in the service in the office, staff, division, department, or unit,* and in the case of **members of fire departments**, except those whose principal duties are clerical, such as stenographers, telephone operators, and other officeworkers, and in the case of **county forestry or firefighting departments**, except those whose principal duties are clerical, such as stenographers, telephone operators, and other officeworkers, and in the case of **active firefighting members of the Department of Forestry and Fire Protection** whose duties require firefighting, and in the case of **members of the warden service of the Wildlife Protection Branch of the Department of Fish and Game** whose principal duties consist of active law enforcement service, excepting those whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement service such as stenographers, telephone operators, and other officeworkers, the term "injury" includes **pneumonia and heart trouble** that develops or manifests itself during a period while the member is in the service of the office, staff, department, or unit.

(Italics, underline, and bold added.)

While we sympathize with applicants in that Labor Code section 3212 and the entire statutory scheme conferring certain presumptions of injury is not a model of clarity, the first part of section 3212, which we have italicized above, confers a presumption of injury for *hernia* for police departments of "districts." No pneumonia presumption is created for this class. Rather, section 3212 creates a pneumonia (and heart trouble) presumption for certain classes of firefighters as seen in the portion underlined above.

No other Labor Code sections conferring a pneumonia presumption are cited by the dependents, and none apply to decedent's position. Section 3212.5 applies to full-time members of a police department of a city or municipality highway patrol officers, sheriffs and deputy sheriffs and investigators in district attorneys offices. Labor Code section 3212.3 confers a pneumonia

presumption on peace officers designated under Vehicle Code section 2250.1 "under the service of the Highway Patrol." Section 3212.10 applies to custodial peace officers, parole officers, and probation officers, Section 3213 applies to members of the University of California Police Department, and Section 3212.7 applies to employees of Department of Justice in the "state safety class." None apply specifically to school district police or generally to miscellaneous peace officers.

Courts have constantly held that the statutes creating presumptions for public safety workers (Lab. Code, § 3212 et seq.) are only available to the specifically enumerated classifications listed in each statute. For instance, in *Saal v. Workers' Comp. Appeals Bd.* (1975) 50 Cal.App.3d 291[40 Cal.Comp.Cases 456], it was held that a peace officer employed by the California State University system was not entitled to the heart trouble presumption available to members of municipal police departments (Lab. Code, § 3212.5) or a member of the University of California police (Lab. Code, §3213). In *California Horse Racing Bd. v. Workers' Comp. Appeals Bd. (Snezek)* (2007) 153 Cal.App.4th 1169 [72 Cal.Comp.Cases 903], the court refused to apply the section 3212.5 heart trouble presumption to an inspector employed by the California Horse Racing Board, who argued that his duties were analogous to a police officer. In finding the applicant not entitled to the presumption, the court wrote:

> Section 3212.5 provides that the presumption is available to a specifically designated class of employees of city and county police departments, the California Highway Patrol, sheriffs' departments and district attorney's offices, whose members also fit the statutory definition of a peace officer. Qualifying as a peace officer is not enough. To be entitled to the heart trouble presumption, the member must also fit the job description and be employed by one of the law enforcement agencies specified in the earlier portions of the statute. It is undisputed that [applicant] was not employed by any of the governmental agencies mentioned in section 3212.5.

(*Snezek*, 153 Cal.App.4th at p. 1177.)

The WCJ thus correctly found that decedent was not entitled to any statutory presumption of pneumonia injury.

We otherwise deny defendant's Petition and the remainder of applicants' Petition for the reasons stated by the WCJ in her Report, the relevant parts of which we adopt, incorporate, and quote below:

II.
STATEMENT OF THE CASE AND FACTS

Carlos Valencia died on December 24, 2017 as a result of an injury arising out of and in the course of employment for defendant as a school police officer to his lungs in the form of influenza that became pneumonia. At the time of his death, [decedent] lived with Gloria Valencia, his wife, Celia Valencia, his daughter, and Karina Valencia, his minor granddaughter.

On November 5, 2015, the Oakland Unified School District offered Mr. Valencia employment as a Police Officer II by the Oakland Unified School District, and within a year, he became a sergeant. (Exhibit 107 Personnel File, p. 1, 70.) In relevant part, his job duties included patrolling district property, responding to crime-in-progress calls regarding district property, personnel, and students, conducting preliminary investigations of incidents involving police services personnel, preparing reports, making arrests, preparing programs regarding subjects to district services and the public. (*Id*. at pp. 33, 72.)

On May 3, 2019, Gloria Valencia testified as follows during her deposition: To her knowledge, her husband could not have gotten sick any place besides work. (Exhibit A, Deposition of Gloria Valencia,14:24- 15:1.) Once, her husband responded to an incident at a pizza parlor across the street from the school after 911 was called, and her husband arrested some of the people. (*Id*. at p. 17:2-17:23.) Her husband always said that he could be called to help Oakland PD at any time, and a few times, he provided such back up when he was closer than the Oakland PD. (*Id*. at p. 23:11-23:23.) Her husband's job duties did not keep him on a school campus, and they included traveling between schools, stepping out if there was a problem on the streets, going to big calls, and checking up on schools. (*Id*. at pp. 23:11-24:25.) She did not notice any difference between his prior job duties as a police officer for San Jose and as a peace officer for defendant. (*Id*. at p. 23:11-25:17.)

On July 10, 2020, Eli E. Hendel, M.D., issued a Qualified Medical Evaluation (QME) report after reviewing records. As relevant herein, Dr. Hendel stated that, if Mr. Valencia's job duties included exposure to the public, particularly when exposed to students in middle school and high school, there was a reasonable medical probability that Mr. Valencia contracted influenza at work and that the influenza caused pneumonia. (Exhibit 101, Report of Eli Hendel, July 10, 2020, pp. 13-14.)

On April 20, 2023, Dr. Hendel testified as follows during his deposition: Influenza is a virus that usually spreads from person to person and most cases of

pneumonia are aspiration (Exhibit 103, Deposition of Eli Hendel, M.D., April 20, 2023, 9:8- 10:25.) Breaking up a fight, such as the one at the pizza parlor would require close involvement, close breathing, shouting, and it is reasonably probable that there is more air transferred between the participants. (*Id*. at p. 15:4-15:24.) Close proximity with an infected person is what is required to make it medically probable that a person would catch influenza. (*Id*. at p. 19:18-19:22.) At a police department, there would be close interactions with strangers when they have to be subdued and it is "more reasonable/probable that someone can contract an infection disease in that capacity than, say, working as a clerk in a county office." (*Id*. at p. 21:7-21:20.) It would also be likely for a person to contract influenza at home because of the confined space. (*Id*. at p. 22:19-22:22.) It would not be medically probable for [decedent] to be exposed to influenza while traveling alone between schools. (*Id*. at p. 23:20-24:4.) It would be medically reasonable/probable for [decedent] to be exposed to influenza while crisscrossing between schools, while in contact with security guards, when separating students between fights, when arresting people, and while reading them their rights. (*Id*. at pp. 27:25- 29:16.) Dr. Hendel had not reviewed evidence of [decedent] being exposed to someone with influenza at work during the period December 10 and December 15. (*Id*. at pp. 30:20-31:3.) Dr. Hendel had reviewed evidence of an influenza outbreak at the schools during the week of December 10 and December 15. (*Id*. at p. 31:12-31:16.) Living with a child does not place you at a greater risk for influenza because it boils down to exposure. (*Id*. at p. 33:2-33:7.) Dr. Hendel did not have evidence that influenza was more preponderate in students between 9th and 12th grades compared to other groups, but police officers have more preponderance to develop pneumonia in the course of employment because of the elements of the public to which they are exposed. (*Id*. at p. 39:15-40:11.)

The following exchanges occurred during the deposition:

> Q. … My question is whether a person helping or aiding an Oakland police officer may have medically reasonable/probable increase or can be exposed to influenza to a higher degree.
>
> A. You mean a person helping the police? Yes.
>
> Q. So anyone that helps police officers may have been more -- have more exposure to influenza?
>
> A. Yes.
>
> Q. And when I mean 'anyone,' I mean not necessarily police officers, but anyone; correct?
>
> A. Anyone who is performing the same job of police officers in having exposure to the general public like police officers are.

Q. I understand, Doctor. But my question is anyone who aids the police officer. Anyone. A person in the street, a doctor, an attorney. Anyone who aids them.

A. Anybody who aids them, as long as they're doing what the police is doing. If somebody is, say, aiding by sitting in a desk and doing research in a computer in the safety of his own office, then it's not a greater risk. But if someone is aiding a police officer in the same situation that a police officer would be, then, yes.

(*Id.* at p. 25:17-26:13.)

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Q. And in her deposition, in page 23, line 23, Mrs. Valencia indicated that her husband, Mr. Valencia, knew that any time traveling between schools, if there was a problem on the streets, that he was -- it was his duty to step out and assist in any way. And it was his duty to step out and assist in any way, especially if somebody -- if someone was in danger. So would it be medically reasonable/probable for anyone to be exposed to influenza with coming in contact as helping someone in danger in the street?

A. Yes.
(Id. at p. 27:3- 27:13.)
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Q. Is there any particular working activities that made him to an increased risk compared to the general public?

A. The close proximity to individuals without any warning. He is called suddenly to attend a situation, and he has no opportunity to check these individuals is it safe to get close to. Unlike me. I get asked to see a patient that is known to have a communicable disease. That patient is in an isolated room. I put on a gown, glove, and I see the patient at my own pace. A police officer does not have that luxury.

Q. Um-hmm. But that's in compared with you, a health professional. What about any other person, any other\profession? Not everyone has those precautions.

A. Right.

Q. So it's, at the end of the day, the proximity.

A. Well, any -- any profession that exposes to the general -- to more than

> the usual exposure to the general public that otherwise would be in close proximity.

(*Id*. at p. 42:2-42:22.)

On July 13, 2023, Dr. Hendel continued to testify as follows during part two of his deposition: [Decedent's] exposure to people at and outside of work was the basis of his opinion that [decedent's] exposure was industrial, not the presumption. (Exhibit 104, Deposition of Eli Hendel, M.D., July 13, 2023, p. 53:8-53:17.) Patrolling in itself would not increase [decedent's] risk of contracting influenza, the question to ask was how much contact he had with individuals. (*Id*. at p. 57:3-57:24.) The widow's deposition did not describe when the incident at the pizza parlor happened, and he was not provided with any evidence reflecting that [decedent] was in close to proximity with a person infected with influenza during the period December 10, 2017 to December 15, 2017. (*Id*. at p. 58:9-58:25.) It is known that police officers have close contact with individuals when they arrest them or have altercations and there is heavy breathing and screaming, which is more than a simple conversation, but he does not have articles about school police officers. (*Id* at p. 59:9-59:15.) His opinions of Mr. Valencia's work activities were described on page 13 of his report dated July 10. (*Id*. at p. 77:8-77:15.) In his opinion, a school police officer's risk of contracting influenza by virtual of employment was materially greater than that of the general public. (*Id*. at p. 70:5-70:9.) This was because:

> A General public, you're putting the summation of the entire population in arriving at an area that is unknown in terms of contact with people. You're taking extremes. And you're taking -- the peak of the curve has been to be somewhere in the middle, assuming that the general public is not skewed. It's a big assumption.
>
> A specialized job such as Officer Valencia's has specific boundaries, parameters, and requirements in which are more predictable; therefore, when one analyzes the burden of exposure with -- let me just rephrase that term "general public." The public of -- it's a public of student body. They're teenagers. That's what they have in common. And they have in common that they behave like teenagers. Some of them are good, some of them are less good. So there's a variety there. But nevertheless, the special situation here is that we have an individual as Officer Valencia who has done a job with a specific task that sets him apart from the general working public. And he's exposed to the student body and fatality body. So that's also a segment of the general public. So that will be a more accurate way of describing the situation.

(*Id.* at p. 70:14- 71:12)

The following exchanges occurred during Dr. Hendel's deposition:

Q So based on what you're trying to explain to me is that your context of the general public as the police officer that puts him to a different segment is something more related to the general working force?

A Well, again, general public and general working population. A police officer is a specialized -- he's in the category of specialized worker population. .requires training. It requires skills and specific duties.

Q Let's assume that general public means everyone else that is not a police officer.

A Working public.

Q Just the term general public?

A Yes.

Q Let's work with that term. Let's assume that general public means anyone else that is not the [Decedent].

A Yes.

Q Could there have been exposure to the influenza if they have been working the same duties that the [Decedent] was working?

A Yes.

Q Would there -- were other jobs that may have the same or more exposure than the [Decedent] had?

A Health care workers have more exposure to sick people.

(*Id*. at p. 73:19-74:19)

On October 25, 2023, this matter proceeded to trial. As relevant herein, Gloria Valencia testified that: Her husband started working for Oakland Unified Police Department as a police officer and then became a sergeant. She is familiar with [decedent's] job duties. His duties included patrolling school grounds, attending school board meetings, arresting people, investigating crimes on school grounds, and assisting the police department. Most of his day was spent interacting with people. He would answer dispatch calls, and dispatch would call him if Oakland PD was busy. Once, he was the first responder to an incident at a fight between some kids at a pizza parlor that was across the street from school grounds. He died on December 24, and he started coughing after a Wednesday school board meeting, then on Friday he was sent home early because of his cough and

because he was previously scheduled to be on vacation the following week. On Tuesday, she began to feel ill, and on Wednesday, he called his doctor and received some prescriptions. On Thursday, the medicines were not working and Karina became ill. On Friday, Celia took him to the hospital. He was the first one to get sick at home.

Gloria Valencia continued to testify in relevant part that Karina has always lived with them, and Karina's biological father has never been in the picture. Carlos was Karina's financial provider. Celia did try to live on her home but could not support herself. Celia never paid rent, and their mortgage was about $1,900 a month with $4,000.00 a year in property taxes and utility bills from PG&E of $350- $500 a month. She and her husband also paid for all of the groceries, which were $500 to $700 a month, paid $200.00 for cable, and bought a car for Celia. Her husband's earnings paid for paid for Karina's dance classes, Spanish immersion, school tuition, a college fund, Karina's clothes, KinderCare, and piano lessons. Celia had a job, but she did not contribute to any household expenses. Carlos wanted Celia to get out of debt and pick up the pieces. Celia has drug dependency issues.

As relevant herein, Celia Valencia testified as follows during the trial: She moved back in with her parents because of drug issues, and Karina was born in the following year. She does not pay for food, utilities, or rent. When Karina was three, she began to receive $500 a month in child support. In 2017, she was employed as a medical assistant. Initially, she worked two part time jobs but found up working full time as an optician. She looked at her tax returns an hour before testifying, and in 2017, she earned $36,050.00. She pays for part of Karina's tuition, and Karina has a scholarship. When her father was alive, she would use her money to go out, buy drugs, and outfits. She was not dependable and she was not financially able to care for her daughter. In 2017, she could not live on her own or afford a place for her and her daughter. She still cannot live on her own, and is dependent on her father's pension. She listed Karina as a dependent on her 2017 taxes.

On November 3, 2023, the Findings and Award issued, and in relevant part, it was determined that Mr. Valencia's pneumonia was not presumed compensable pursuant to Labor Code Sections 3212 et seq., that [decedent's] employment placed him at an increased risk of contracting influenza than the general public, that Gloria Valencia was a total dependent, and that Celia and Karina Valencia were partial dependents.

On November 22, 2023, defendant filed its Petition for Reconsideration.

On November 27, 2023, Mr. Valencia's dependents filed their Petition for Reconsideration.

III.

DISCUSSION

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There is Substantial Evidence Reflecting that Mr. Valencia's Employment Placed Him at an Increased Risk of Contracting Pneumonia

In *Latourette v. Workers' Comp. Appeals Bd.*, 17 Cal. 4th 644, 653, the Supreme Court stated that, "the general rule governing injury from nonoccupational disease … differs markedly from that governing physical injury from a condition of the employment that places the employee in a position of danger." The Court stated that, because of the difficulty in determining causation when the source of injury is uncertain such as being the product of often widespread viral organisms, "[t]he fact that an employee contracts a disease while employed … will not establish the causal connection" and the "potentially high costs of avoidance and treatment for infectious diseases, coupled with the fact that such illnesses often cannot be shown with certainty to have resulted from exposure in the workplace, also explain[ed]" the difference in how non-occupational diseases are treated. (Id. at p. 654.)[….] There are two principal exceptions to the general rule of noncompensability of nonocupational diseases. The first is if the employment subjects the employee to an increased risk compared to that of the general public, and the second, if the immediate cause of the injury is an intervening human agency or instrumentality of the employment. (*Ibid.*)

Therefore, 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 [decedent] contracted the disease may be unanswerable with any certainty. In those circumstances, the Appeals Board has explained that an employee can establish industrial causation by demonstrating that it is more likely [decedent] 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.) For example, a detective's Hepatitis B infection arose out of and in the course of employment because the nature of his work exposed him to drug addicts and needles and those exposures resulted in a higher probability of contracting Hepatitis B than the general population. (*City of Fresno v. Workers' Comp. Appeals Bd. (Bradley)* (1992) 57 Cal. Comp. Cases 375 (writ den.).) In another case, a Hepatitis C infection contracted by a sewage worker was found industrial based on medical reporting that it was "more probable than not" that [decedent] contracted the virus at work. (*City of Turlock v. Workers' Comp Appeals Bd.* (STK09YYZZZ) (2007) 72 Cal. Comp. Cases 931, 934 (writ den.).)

Further, any decision must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3

Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Here, Dr. Hendel repeatedly stated that close proximity with an infected person is the way to contract influenza. (Exhibit 104 at p. 19:18-19:22; 19:23-21:5.) Dr. Hendel further testified that [decedent's] injurious exposure was most likely between the period December 10, 2017 and December 15, 2017. Gloria Valencia's credible and unrebutted testimony was that during that time frame, her husband's activities were limited to working because he was preparing to take vacation during the following week, and she also credibly testified that her husband was the first member of the family to become ill. Further, Dr. Hendel testified that it would be medically reasonable/probable for [decedent] to be exposed to influenza while in contact with guards, separating fights, and arresting people, and that Mr. Valencia's job duties placed him at a greater risk than the general public for contracting influenza. (Exhibit 103 at pp. 27:25-29:16; 39:15-40:11; 25:17-26:13; 42:2-42:22; Exhibit 104 at pp. 59:9-59:15; 70:5-70:9; 73:19-74:19.) Thus, [decedent's] job descriptions and Gloria Valencia's testimony reflect that his job required him to have close contact with other people, and the more close contact he had with others, he higher his risk of contracting influenza would be. Accordingly, I found that Mr. Valencia's dependents met their burden of proving that[decedent's] employment placed him at an increased risk of contracting influenza.

It is true that Dr. Hendel was unable to pinpoint the exact person that exposed Mr. Valencia to influenza, however, this is not cause to find his opinions are not substantial evidence. As explained above, the Appeals Board has recognized that such a question may be impossible to answer, and that is the reason the special risk test is utilized in cases such as this one. (*Bethlehem Steel Co, supra,* (1943) 21 Cal. 2d 742.) It is also true that Dr. Hendel testified that patrolling in a car by himself would not increase [decedent's] risk of contracting influenza. However, this is also not a basis to set aside the Findings and Award, because there is no evidence reflecting that patrolling in a car by himself was the only activity that [decedent] performed during the exposure period. Rather, Mrs. Valencia's deposition testimony, that Dr. Hendel reviewed, reflected that she did not notice any difference between Mr. Valencia's prior job duties as a police officer for San Jose and a peace officer for defendant, that her husband had to report to schools, respond to calls, and make arrests. (Exhibit A, pp. 17:2- 17:23.; 23:11-24:25.) Similarly, Mr. Valencia's personnel file reflected that his job duties included responding to crime in progress calls, conducting investigations, and making arrests. (Exhibit 107 at pp. 22, 72.) Further, Dr. Hendel testified that breaking up fights, making arrests, and subduing suspects would require close

breathing and expose [decedent] to an increased risk of contracting influenza. (*Id*. at p. 15:4-15:24; 21:7-21:20; 27:25-29:16; 39:15:40:11; 25:17-26:13; 27:3-27:13; 42:2-42:22; 70:5-71:12.) Dr. Hendel provided reasoning in support of these opinions and they are substantial evidence. Mrs. Valencia also testified in detail regarding [decedent's] job duties during trial. The fact that Dr. Hendel did not review any articles specifically describing the risks of exposure faced by school officers is insufficient to rebut that finding. In fact, it is unclear whether such articles even exist. Moreover, Dr. Hendel's testimony somewhat confusing testimony regarding the definition of the general public should not be a basis to set aside the Findings. This is because the doctor clearly testified that exposure to an infected individual would be the greatest risk factor for contracting influenza and [decedent's] job duties placed him at an increased risk of exposure.

Karina Valencia was Mr. Valencia's Partial Dependent

Section 3501 states that,

> (a) A child under the age of 18 years, or a child of any age found by any trier of fact, whether contractual, administrative, regulatory, or judicial, to be physically or mentally incapacitated from earning, shall be conclusively presumed to be wholly dependent for support upon a deceased employee-parent with whom that child is living at the time of injury resulting in death of the parent or for whose maintenance the parent was legally liable at the time of injury resulting in death of the parent.
>
> (b) A spouse to whom a deceased employee is married at the time of death shall be conclusively presumed to be wholly dependent for support upon the deceased employee if the surviving spouse earned thirty thousand dollars ($30,000) or less in the twelve months immediately preceding the death. (Lab. Code, § 3501, emphasis added.)

Section 3502 further provides that,

> In all other cases, questions of entire or partial dependency and questions as to who are dependents and the extent of their dependency shall be determined in accordance with the facts as they exist at the time of the injury of the employee.

Karina is not presumed to be total dependents pursuant to section 3501. This is because the statute describes an "employee-parent," not a "employee-grandparent." (See *Zavala v. Sonoma Compost Co. LLC*, 2012 Cal. Wrk. Comp. P.D. LEXIS 166; *Skubitz v. Hanford Community Hosp.*, 2016 Cal. Wrk. Comp. P.D. LEXIS 168. Therefore, the question of the extent of her dependency is one of fact.

In addressing the issue of determining the extent of dependency, the Supreme Court stated that, "[i]t is but a truism to say that total dependency exists where the applicants subsist entirely on the earnings of the deceased employee, but in applying this rule courts will not deprive applicants of the rights accorded total dependents, when otherwise entitled thereto, merely because of minor considerations or benefits which do not substantially affect or modify the status of the applicants toward the deceased employee." (*Peterson v. Industrial Acci. Com.*, (1922) 188 Cal. 15, 18.) Since that time, the law has been that irregular, temporary, or inconsequential earnings in an of themselves will not bar a finding of total dependency. (See e.g. *Colonial Ins. Co. v.. Industrial Acci. Com* (1946) 11 Cal. Comp. Cas. 50, *Flatland v.. Industrial Acci. Com.* (1936) Cal. Comp. Cas. 55.)

At the time of her grandfather's death, Karina's mother was receiving $500.00 a month in child support, and there is no evidence that this support was "irregular, temporary, or inconsequential." Further, Celia listed Karina as a dependent on her taxes. It is true that Gloria and Carlos Valencia played a large roll in Karina's support, however, it is also true that Celia also partially contributed towards Karina's support and care, and accordingly, Karina was a partial dependent of Carlos Valencia. (See *Riley v. Workers' Compensation Appeals Bd., SOS Steel Fabrications*, (2006) 71 Cal. Comp. Cases 1340 (writ den.).)

Based upon the above, I recommend that both Petitions be denied[….]

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of November 3, 2023 is **DENIED**.

IT IS FURTHER ORDERED that Applicants' Petition for Reconsideration of the Findings and Award of November 3, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMISSIONER

/s/ CRAIG SNELLINGS, COMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 22, 2024

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

GLORIA VALENCIA
CELIA VALENCIA
THE ANTON LAW GROUP
SHAW, JACOBSMEYER, CRAIN & CLAFFEY

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