

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

DEVON FITZGERALD, *Applicant*

vs.

**CITY OF NEWPORT BEACH - POLICE DEPARTMENT, permissibly self-insured,
administered by ADMINSURE INC., *Defendants***

**Adjudication Number: ADJ11815084
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings of Fact (Findings), issued by the workers' compensation administrative law judge (WCJ) on December 23, 2020, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE), in the form of leukemia.

Defendant contends that the reports and deposition testimony of internal medicine qualified medical examiner (QME) Lawrence R. Miller, M.D., are not substantial evidence and should not be the basis for the Findings.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind the Findings and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury in the form of leukemia, while employed by defendant as a crime scene investigator, during the period from May 2, 2005, through May 9, 2017.

On October 2, 2018, QME Dr. Miller evaluated applicant. Dr. Miller examined applicant and reviewed the medical record. He took a history but noted that, "[N]o MSDS [material safety

data sheets] information was provided for this QME evaluation.” (App. Exh. 1, Dr. Miller, October 2, 2018, p. 3.) The doctor diagnosed applicant as having “Polyangiitis with granulomatosis”¹ and “Promyelocytic leukemia.”² (App. Exh. 1, p. 17.) Regarding the cause of applicant’s condition, Dr. Miller stated:

While the carrier was unable to provide a material data safety sheet, the patient is reporting to me in the course of the interview that she was exposed to cyanoacrylate ester, black powder, and ninhydrin. I was unable to identify any causal relationship of acute myeloleukemia with black powder or ninhydrin but there is controversial evidence that cyanoacrylate ester can be responsible for malignancy. This chemical is metabolized to formaldehyde and there is debate in the literature whether or not formaldehyde is a chemical that can induce myeloid malignancy. While the United States Environmental Protection Agency proposed a hypothetical mode of action to explain how inhaled formaldehyde might induce leukemia in occupationally exposed workers, this theory has been questioned. Several studies have since disputed this association and do not support the hypothesis that formaldehyde increases the risk of lymphohematopoietic malignancies. ... ¶ So, while it is unclear that her exposure to cyanoacrylate ester, black powder and ninhydrin was responsible for AML; it is accepted at least as possible that workplace exposure to diesel, gasoline, and several other chemicals and solvents such as benzene may be responsible for development of AML. ¶ Therefore, it is my opinion that her long exposure to diesel and gasoline fumes, smoke, and combustion products could have contributed to her acute myeloid malignancy and the preceding appearance of an ANCA-vasculitis, which was a paraneoplastic finding. (App. Exh. 1, pp. 19 - 20.)

On October 8, 2019, Dr. Miller’s deposition was taken. (App. Exh. 3, Dr. Miller, October 8, 2019, deposition transcript.) The doctor’s testimony, relevant to the issues to be addressed herein, included:

A. But I did have the -- she was sort of the same presumption of guilt like a fireman or policeman who is exposed to these fumes, that policeman, firemen have a higher incidence of AML due to exposure to combustion diesel fumes, gasoline like she was said she was exposed to. ¶ So, by that same presumption, I treated her like a policeman or fireman who has that same presumption where those fumes can be responsible for AML....

¹ A condition that causes inflammation of the blood vessels. - can affect the ears, nose, throat, lungs, and kidneys. Blood flow to organs and tissues may be reduced, causing damage. (Merriam-Webster Medical Dictionary)

² Acute promyelocytic leukemia (APL) is a unique subtype of acute myeloid leukemia (AML) in which cells in the bone marrow that produce blood cells (red cells, white cells and platelets) do not develop and function normally. (Merriam-Webster Medical Dictionary)

Q. Okay. So with regard to that statement, Doctor, you were analyzing her as though she was either working as a policeman or a fireman; is that right?

A. Correct.

Q. So you were thinking in terms of the presumptions; is that correct?

A. Exactly.

Q. Okay.

A. Exactly, because I had no other MSDS.

Q. All right. And that's how you analyzed your causation?

A. Exactly, that's exactly right.

(App. Exh. 3, pp. 21 – 22.)

A. So I just said I think there is causation. Especially because of the presumption, I treated her like a fireman and that it contributed, and there may be some predisposing genetic factors that make you more predisposed to leukemia. pp. (App. Exh. 3, pp. 32 – 33.)

Q. Okay. Would you also defer the issues of causation regarding the complexity of this case to a hematologist --

A. Yes.

Q. -- to look at the entire record and take an independent look?

A. Yes, I would. I would defer. I am not a Board Certified Hematologist [sic]. I have not treated these conditions.

(App. Exh. 3, p. 33)

Q. Okay. Is it correct, Doctor, that a hematologist [sic] would be more familiar with the issues present in this case and any drug induced interplay?

A. Yes, they would be.

(App. Exh. 3, p. 34.)

A. My opinion is still that I am treating her like a fireman who was exposed to a lot of aromatic hydrocarbons and ... fumes and dust and she got leukemia at 35. For a woman to get AML at that age, something else is going on.

Q. Okay. But would [you] agree, Doctor, that this is somewhat of an unusual complex case?

A. Absolutely.

Q. Okay.

A. Absolutely.

Q. Would you also agree that a hematologist may be better versed as far as issues of causation in this particular case because of the complexity?

A. Absolutely.

Q. Okay. And this person, whoever it may be, a hematologist would be better suited to also analyze the potential interplay with regard to the Crohn's and the abstract at least that reference the potential link with AML?

A. Yes.

(App. Exh. 3, pp. 34 – 35.)

Q. And you believe that based on your education and experience and clinical judgment that you are capable of rendering an opinion in this case of causation and impairment and apportionment?

A. Except for apportionment, yes.

Q. Okay. But with respect to causation

A. Causation, I was comfortable.

Q. -- you believe you are qualified to render an opinion on that issue?

A. Yes.

(App. Exh. 3, p. 36.)

Q. And, Doctor, I believe you said you analyzed causation in this case in view of the presumptions; is that right?

A. Absolutely.

(App. Exh. 3, p. 37.)

Q. Okay. So, if a hematologist [sic] reviewed the case and provided an opinion on causation

A. That's different.

Q. -- that differed from yours perhaps, you would consider that in your overall view of causation in this matter; is that right?

A. Absolutely. Absolutely.

(App. Exh. 3, p. 38.)

Q. Doctor, you are talking about the presumption. You do understand that the presumption that's afforded to certain safety officers pursuant to the Labor Code does not apply to the applicant in this case; correct?

A. That's correct. But I treated her as such because she -- her testimony was that she was exposed to as much, and perhaps other things in the lab which I wasn't able to get a hold of that may have precipitated the malignancy.

(App. Exh. 3, p. 39.)

Dr. Miller was provided additional medical records to review, and in his May 31, 2020 supplemental report he stated:

[I]t remains my opinion as outlined in my October 2, 2018 report that her prolonged industrial exposure while working as a crime scene investigator with exposure to combustion fuels, gasoline, diesel and possible formaldehyde contributed to the early onset of an expected AML. Due to her work exposure she deserves the presumption afforded fire workers and police officers.

(App. Exh. 2, Dr. Miller, May 31, 2020, p. 2.)

On September 3, 2020, Dr. Miller's deposition was taken again. (App. Exh. 4, Dr. Miller, September 3, 2020, deposition transcript.) His testimony included:

THE WITNESS: I think I said she deserves the same presumption as a fireman or police officer, even though she was not in either one of those positions, but she had the same toxic exposure to solvents and chemicals and fumes and diesel exhausts that a fireman and/or police officer would be exposed to. And, as such, I thought she deserved the same presumption. (p. 55 [EAMS p. 12].)

Q. All right. Well, in that regard, Doctor, I think you previously testified that because you did not have access to MSDS sheets

A. Right.

Q. -- that you were analyzing the case in terms of the presumption with what you're familiar with obviously from analyzing police and fire cases; correct?

A. That's more correct, what I said, or what I wanted to say, correct. (p. 56 [EAMS p. 13].)

Q. Okay. But, in this case, completely absent and apart from any presumptions, the information provided to you with respect to her workplace exposures in and of themselves is enough for you to find industrial causation; correct?

A. That's right. I didn't find any other reason for this unusually young woman to get this type of malignancy, correct. (p. 66 [EAMS p. 23].)

The parties proceeded to trial on December 15, 2020, and the issue submitted for decision was injury AOE/COE. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 15, 2020, p. 2.)

DISCUSSION

Defendant's Petition is identified as a "Petition for Reconsideration or in the alternative, Removal." A petition for reconsideration may only be taken from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].)

Injury AOE/COE is a threshold issue, a finding of injury AOE/COE determines the substantive rights of the parties. Based thereon, the Petition is deemed a Petition for Reconsideration and we will address the issues by utilizing the applicable reconsideration standards.

An award, order or decision by the Appeals Board must be supported by substantial evidence in light of the entire record. (Lab. Code §§ 5903, 5952; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635-637 [35 Cal.Comp.Cases 16].) A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess, and the medical opinion must set forth the reasoning behind the physician's opinion, not merely his or her conclusions; a mere legal conclusion does not furnish a basis for a finding. (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, [33 Cal.Comp.Cases 647]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Labor Code section 3212.1 states in part:

(a) This section applies to all of the following:

(1) Active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments:

(A) A fire department of a city, county, city and county, district, or other public or municipal corporation or political subdivision. ...

(4) Peace officers, as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivisions (a) and (b) of Section 830.37, of the Penal Code, who are primarily engaged in active law enforcement activities. ...

(b) The term "injury," as used in this division, includes cancer, including leukemia, that develops or manifests itself during a period in which any member described in subdivision (a) is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director. ...

(d) The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. ...

(Lab. Code, § 3212.1)

Our review of the record indicates there is no dispute that applicant's employment as a crime scene investigator is not subject to the firefighter and/or police officer presumption in Labor Code section 3212.1. However, in his reports and deposition testimony Dr. Miler repeatedly stated

that he used the presumption to make the connection between applicant's exposure to chemicals and her development of cancer. For example, in his first deposition he testified as follows:

Q. Okay. So with regard to that statement, Doctor, you were analyzing her as though she was either working as a policeman or a fireman; is that right?

A. Correct.

Q. So you were thinking in terms of the presumptions; is that correct?

A. Exactly.

Q. Okay.

A. Exactly, because I had no other MSDS [Material Safety Data Sheet].

Q. All right. And that's how you analyzed your causation?

A. Exactly, that's exactly right.

(App. Exh. 3, pp. 21 – 22; see also pp. 32 - 39.)

At his second deposition Dr. Miller again testified that because he did not have access to material safety data sheets (MSDS) he analyzed applicant's case in terms of the presumption. (App. Exh. 4, pp. 55 - 56 [EAMS pp. 12 - 13].) He later testified that:

Q. Okay. But, in this case, completely absent and apart from any presumptions, the information provided to you with respect to her workplace exposures in and of themselves is enough for you to find industrial causation; correct?

A. That's right. I didn't find any other reason for this unusually young woman to get this type of malignancy, correct. (App. Exh. 4, p. 66 [EAMS p. 23].)

This testimony is inconsistent with all of his previous statements that since he was not provided any material safety data sheets, he used the presumption in reaching his conclusion regarding the cause of applicant's cancer. Dr. Miller's application of the Labor Code section 3212.1 firefighter/police officer presumption is clear evidence that his conclusion regarding injury AOE/COE is based on an incorrect legal theory.

Further, in his October 2, 2018 report, Dr. Miller explained that although there is "a hypothetical mode of action to explain how inhaled formaldehyde might induce leukemia" that theory is debated and several studies dispute and "do not support the hypothesis." (App. Exh. 1, p. 19.) He then concluded that applicant's exposure to chemicals "could have contributed to her acute myeloid malignancy and the preceding appearance of an ANCA-vasculitis, which was a paraneoplastic finding." (App. Exh. 1, p. 20.) Dr. Miller's conclusion that applicant's chemical exposure "could have" been a cause of her cancer appears to be based on speculation, conjecture, or guess.

Finally, at the October 8, 2019 deposition, Dr. Miller stated that because he is not a Board Certified Hematologist, he would defer the issue of causation to a hematologist. (App. Exh. 3, p. 33.)

For the reasons discussed herein, it is clear that Dr. Miller's opinions, as stated in his reports and his deposition testimony, are not substantial evidence and are not an appropriate basis for determining the issue of injury AOE/COE.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].)

Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) However, under the circumstances of this matter, it may well be in the parties' interest to have applicant evaluated by an internal medicine-hematology agreed medical examiner or in the alternative, for the WCJ to appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we rescind the Findings and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 23, 2020, Findings of Fact is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 29, 2021

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

**DEVON FITZGERALD
STRAUSSNER & SHERMAN
LAW OFFICES OF BRIAN T. RILEY**

TLH/pc

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