WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MIGUEL MENCHACA (DEC), ***Applicant***

vs.

DEPARTMENT OF DEVELOPMENTAL SERVICES, Legally Uninsured, Administered By STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Number: ADJ9553930
Long Beach District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision 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 and Opinion on Decision, which are both adopted and incorporated herein, we will deny reconsideration.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*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 determination. (*Id.*)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

DEIDRA E. LOWE, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 22, 2021

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

EILEEN MENCHACA
LAW OFFICE OF THOMAS CARTER
STATE COMPENSATION INSURANCE FUND

PAG/oo

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

REPORT AND RECOMMENDATION
OF WORKERS' COMPENSATION JUDGE ON
PETITION FOR RECONSIDERATION

I.
INTRODUCTION

Petitioner, defendant, Department of Developmental Services Lanterman, legally uninsured with State Compensation Insurance Fund administering, has filed a timely and verified Petition for Reconsideration of the Findings of Fact issued on March 30, 2021. The Petitioner indicates that it is aggrieved by the decision of the undersigned and seeks reconsideration because the evidence does not justify the findings of fact.

II.
FACTS

On or about July 16, 2020, applicant's counsel filed a Declaration of Readiness to Proceed seeking to set this matter for a Mandatory Settlement Conference.

On or about August 13, 2020, the parties appeared before the Honorable John A. Siqueiros at the Mandatory Settlement Conference and jointly requested that the matter be set for trial.

On or about March 4, 2021, the parties presented for trial. The parties agreed to bifurcate all issues except for whether the injury arose out of and occurred in the course of employment.

On or about March 30, 2021, a Findings of Fact and Opinion on Decision issued wherein it was found that the applicant sustained injury arising out of and occurring in the course of employment to his respiratory system as a result of exposure to asbestos which resulted in his death on July 28, 2013.

It is from this Finding of Fact that the Petitioner has filed its Petition for Reconsideration.

III.
DISCUSSION

The Petitioner contends that the evidence does not justify the Findings of Fact. The Petitioner primarily asserts that the medical evidence of the Panel Qualified Medical Examiner (hereinafter referred to as "PQME") is not substantial evidence. And secondly, the Petitioner asserts there was no actual evidence offered by the applicant to support the contention that the decedent was exposed to asbestos while he worked for the employer.

SUBSTANTIAL EVIDENCE

The Petitioner's first assertion is that the opinion of Dr. Meth, the PQME, was not substantial medical evidence. The Petitioner believes the reporting of Dr. Meth failed to meet the substantial evidence standard because the PQME did not rely upon objective information to determine that the decedent's death was industrially related or hastened (Petition for Reconsideration, page 4, lines 22-23). The Petitioner also asserts that the there was no credible evidence that the decedent was exposed to asbestos while working at the Lanterman location. (Petition for Reconsideration, page 5, lines 19-20).

It is well established that a decision must be supported by substantial medical evidence. Lamb v. Workmen's Comp. Appeals Bd. (1974) 11 Cal. 3d 274, 280-281. Case law has indicated that, in order for a medical opinion to be substantial, it "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.

In this matter, the parties obtained a PQME, Dr. Meth. Dr. Meth formulated his opinion based upon the information provided to him by the parties. First, he reviewed records from the Lanterman Developmental Center (Joint Exhibit A3 at pages 18-19). Second, he reviewed the deposition of Eileen Menchaca (Joint Exhibit A3, page 19) and he interviewed her (Joint Exhibit A4 at page 1-2). Third, Dr. Meth relied upon a White Paper from John Howard entitled "9-11 Minimum Latency and Types or Categories of Cancer" to formulate his opinion that the decedent's four years of exposure to asbestos made it medically probable that his exposure contributed in a small way to the development of his small cell lung

cancer. (Joint Exhibit A2 at page 2). Moreover, despite the cross examination by the Petitioner, Dr. Meth's position did not waiver. He still found that that there was a contribution by asbestos exposure and stress in the workplace that hastened or contributed to Mr. Menchaca's death (Joint Exhibit A5, page 14, line 9-13). To assert that Dr. Meth did not rely upon objective information to make his determination is incorrect. Clearly, Dr. Meth relied not only upon the uncontroverted information provided to him by the parties, but also a scientific White Piper to formulate his opinion. There was nothing in the record to lead the undersigned to believe that Dr. Meth's medical report was not substantial medical evidence.

BURDEN OF PROOF

The Petitioner next contends that there was no evidence offered by the applicant to assert that Mr. Menchaca was actually exposed to asbestos fibers while employed by Lanterman. The Petitioner analogizes the matter to the Skip Fordyce[1] case. Admittedly, this case bears some similarity to the Skip Fordyce matter; however, this case also bears similarity to the McAllister[2] case. In McAllister the Court recognized that the Workers' Compensation Appeals Board is bound to uphold a claim in which the proof of industrial causation is reasonably probable, although not certain or "convincing" McAllister v. Workers' Comp. Appeals Bd. (1968) 69 Cal.2d 408, 419. Here, the Finding in this matter was based on more than the mere testimony of Eileen Menchaca. Eileen Menchaca credibly testified at trial that her husband told her that he had issues with asbestos at Lanterman because there were broken floor tiles which caused fibers to go into the air when the floor was vacuumed (Summary of Evidence, page 4, lines 19-21). She also testified that she had a conversation with Wayne Hendricks, her husband's supervisor, about asbestos and the problems with the broken tile while vacuuming (Summary of Evidence, page 5, lines 12-14). Eileen Menchaca's testimony was the only

[1] Skip Fordyce v. Workers' Comp. Appeals Bd. (1983) 48 Cal Comp Cases 904.

[2] McAllister v. Workers' Comp. Appeals Bd. (1968) 69 Cal.2d 408.

testimonial evidence offered at trial. No evidence[3] was offered to rebut her testimony. Essentially, her testimony was uncontroverted and unimpeached. Moreover, Eileen Menchaca's testimony was only one of the factors used to determine that the burden of proof was met. Labor Code §3202.5 states as follows:

> All parties…shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence… "Preponderance of the evidence" means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. (emphasis added).

The applicant offered a variety of evidence to support its contention of industrial causation. Aside from the testimony of Eileen Menchaca, the parties jointly offered the medical reporting of the PQME, Dr. Meth. Again, there was no evidence offered to rebut or challenge Dr. Meth's opinion. Next, the applicant offered the Vanir report (Exhibit 4). This report stated that "amount of asbestos at the facility is unknown but substantial…The facility has an abundance of the 9"x9" floor tile containing asbestos that were installed with mastic containing asbestos…The facility's policy is to assume all the 9"x9" tile are asbestos...Full abatement is required, not just encapsulation (emphasis added) (Exhibit 4 at page L-22). The applicant also offered an email[4] from an administrator to illustrate the prevalence of asbestos. Again, there was no evidence offered to rebut this email. Apart, these pieces of evidence would not meet the burden of proof. However, when all these pieces of evidence were considered together, it became clear that the burden of proof was met because, when these items were weighed with that opposed to it, they clearly had the more convincing force in the view of the undersigned. As such, when Labor Code §3202.5 was applied to this matter as well as the principles espoused in McAllister, it was found that the applicant met its burden to establish industrial causation by a preponderance of the evidence.

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[3] The Petitioner argues that it offered Exhibits A, F, and H to rebut; however, it should be noted that there was no testimony or explanation offered at trial in regards to these Exhibits.

[4] In this email, Donna Tuzzolino wrote as follows:

> Please make a plan to shampoo the carpet in the Communications Office again ASAP. They are complaining about the smell again and there is no way that we can pull the carpet up because of suspected asbestos underneath. Thanks! (Exhibit 2)

III.

RECOMMENDATION

It is respectfully requested that the Petition for Reconsideration be denied.

Dewayne P. Marshall
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

DATE: May 6, 2021

OPINION ON DECISION

The sole issue in this matter is whether the applicant sustained an injury arising out of and in the course of his employment (hereinafter referred to as Injury "AOE/COE") to his respiratory system, abdomen and asbestos resulting in his death on July 28, 2013. The applicant bears the burden of proof as to this issue.[1] Here, in order to meet its burden, applicant's counsel offered both testimonial and documentary evidence to show that the decedent was exposed to asbestos while working for the employer. The applicant's widow testified that her husband told her that he had issues with asbestos at Lanterman because there were broken floor tiles which caused fibers to go into the air when the floor was vacuumed (Summary of Evidence, page 4, line 19-21). She further testified that her husband received a letter from the administration which told them about the issue (Summary of Evidence, page 4, lines 21-22). Moreover, the applicant's counsel offered an "Annual Asbestos & Lead Notification" letter which the employer provided to its employees to notify them of the presence of both asbestos containing materials (ACM) and lead containing materials (LCM) in certain locations on campus" (Exhibit 3). Further, the applicant's counsel offered an email from Donna Tuzzolino , an administrator, who acknowledged that "there is no way that we can pull the carpet up because of suspected asbestos underneath." (Exhibit 2). While the applicant's widow did not have firsthand knowledge of the asbestos fibers in the broken tiles, the applicant's counsel offered a copy of a Vanir report[2] (Exhibit 4). Both the testimony of the widow and the documentary evidence was unrebutted. Aside from the aforementioned, the medical reporting of Dr. Meth was offered as

[1] Labor Code Section 3202.5 states that "all parties...shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence…"

[2] 2This report indicates that "the amount of asbestos at the facility is unknown but substantial….The facility has an abundance of the 9"x 9" floor tile containing asbestos that were installed with mastic containing asbestos…The facility's policy is to assume all the 9"x9" tile are asbestos ….Full abatement is required, not just encapsulation." (emphasis added) (Exhibit 4 at page L-22).

evidence. Dr. Meth opined[3] that it was most medically probable that the exposure the decedent had from asbestos and work stress contributed to the development of his small cell lung cancer which caused his demise. (Exhibit A2). As such, after a review of the evidence, it is found that the applicant's counsel met its burden of proof by a preponderance of the evidence to establish that the applicant sustained an injury AOE/COE to his respiratory system as a result of exposure to asbestos which resulted in his death.

Dewayne P. Marshall
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE
DATE: March 30, 2021

[3] Even during his cross-examination, Dr. Meth remained steadfast in his opinion that there was a contribution by asbestos exposure and stress in the workplace that hastened or contributed to the decedent's death. (Exhibit A4, page 14, lines 9-13).