WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHRISTOPHE LELONG, *Applicant*

vs.

BEVERLY HILLS POLICE DEPARTMENT, PERMISSIBLY SELF-INSURED, ADMINISTERED BY CORVEL, *Defendants*

Adjudication Number: ADJ13173690
Oxnard District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant Beverly Hills Police Department (defendant) seeks reconsideration of the June 29, 2021 Findings of Fact and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a police officer from December 18, 2019 through January 9, 2020, sustained industrial injury to the sinuses and respiratory system. The WCJ found, in pertinent part, that applicant's claimed injury arose from a blood-borne infectious disease triggering the presumption of industrial causation as set forth in Labor Code section 3212.8.[2] The WCJ further found applicant's trial testimony credible, and that defendant had not rebutted the presumption of injury.

Defendant contends that applicant's trial testimony was not credible, that the medical evidence was insufficient to trigger the blood-borne infectious disease presumption, and that the WCJ misinterpreted the scope of the presumption.

We have reviewed applicant's Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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[1] Commissioner Lowe, who was on the panel that granted reconsideration to further study the factual and legal issues in this case, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

[2] All further statutory references are to the Labor Code unless otherwise stated.

We have considered the Petition for Reconsideration (Petition), the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&A.

FACTS

Applicant claimed injury to the sinuses and respiratory system while employed as a police officer by defendant on December 20, 2019.[3] Applicant alleges he developed an infection while traveling from Los Angeles to Hawaii to serve an arrest warrant. (Minutes of Hearing and Summary of Evidence (Minutes), dated June 8, 2021, at 4:14.) Defendant denies injury as not arising out of and in the course of employment (AOE/COE).

In December, 2019, applicant was investigating an act of significant vandalism that was possibly a hate crime. The investigation identified a suspect who had recently traveled to Hawaii. On December 18, 2019, applicant and two other officers flew to Hawaii to search for the suspect. (Minutes, at 4:15.) Upon arrival, applicant learned the suspect may have traveled to another island, and applicant took a second flight. Upon arrival at the second island, applicant was informed that the local police department had detained the suspect, and applicant set up an interview with the suspect. (*Id*. at 4:23.) Following the interview, applicant and his colleagues searched the suspect's hotel room. The search turned up a bag containing "a bunch of junk and debris, which did contain blood and rotting food, a bloody t-shirt, and bloody tissues." (*Id*. at 4:24.)

On December 20, 2019, applicant and his colleagues returned to California with the suspect for booking at the Beverly Hills Police Department. Thereafter, applicant had scheduled time off and did not leave the house. (Minutes, at 5:12.) On December 25, 2019, applicant became ill with significant sinus congestion. Over the next two weeks the symptoms worsened, and applicant presented for urgent care on January 9, 2020 because he could not breathe. (*Id*. at 5:20.) Despite medication and follow-up appointments on January 13, 2020 and January 20, 2020, applicant's symptoms persisted. (Ex. X1, report of Qualified Medical Evaluator (QME) Mufaddal Dahodwala, M.D., dated November 13, 2020, at p. 67.) On January 20, 2020, a CT scan revealed significant opacification of applicant's sinuses, and confirmed a diagnosis of sinusitis. (*Ibid.*) On February

[3] The WCJ's Opinion on Decision observes that QME Dr. Dahodwala characterizes applicant's injury as arising out of one prolonged exposure, which the WCJ identified as December 18, 2019 through January 9, 2020. Accordingly, Findings of Fact No. 1 conforms the injury date to reflect this period of exposure. (Findings of Fact, dated June 28, 2021, Finding No. 1; Opinion on Decision, p. 2; see also Cal. Code Regs., tit. 8, § 10517.)

18, 2020, applicant underwent sinus surgery. Cultures taken during the surgery revealed the presence of *Citrobacter koseri* bacteria. Applicant developed symptoms of progressive weakness and cough, but was able to return to work briefly before the COVID-19 pandemic required applicant to work from home. Applicant's chest and lung condition worsened, and on April 30, 2020, applicant sought treatment at the emergency room, where a CT scan revealed "ground-glass" opacification of both lungs. Applicant was hospitalized for eight days. (*Id*. at p. 67.) Applicant's symptoms showed improvement thereafter.

QME Mufaddal Dahodwala, M.D. evaluated applicant on November 13, 2020, and diagnosed acute sinusitis with cultures growing *Citrobacter koseri*. Dr. Dahodwala found applicant to be permanent and stationary, but deferred assessment of disability pending pulmonary function testing. (Ex. X1, report of QME Mufaddal Dahodwala, M.D., dated November 13, 2020, at p. 72.) With respect to causation, the QME opined:

> Causation is difficult to assess in this case. In regards to [defense counsel] Mr. Allweiss' excellent question, about whether the patient contracted the illness on the flight back from Hawaii that led to his progressive sinusitis, the short answer is, I do not know and there is no way of knowing. All we know for sure, is that the patient reported feeling perfectly fine before his flight, and then starting to feel progressively ill beginning five days after return. Whether the infection occurred on the flight or immediately after he landed and got into his car for the ride back to his house, we will not be able to ascertain. The trip itself was in the course of his normal employment, but whether the infection originated during that trip is unable to be determined. One interesting aspect of this case is the particular bacteria that the patient was colonized with, *Citrobacter koseri*. Research I completed on this organism shows that it is a rare organism to find in sinus cultures. It is more commonly seen in urinary tract infections, as well as in cases of wound infections, meningitis, and sepsis. Infected patients are often immunocompromised or pediatric patients. *Citrobacter* species are not common agents of human disease, and are most often recovered from stool as colonizing flora of the gastrointestinal tract. However, when they are associated with human infection, they can be recovered from blood, cerebrospinal fluid, urine, respiratory tract secretions, and wounds. (*Ibid.*)

The parties deposed the QME on February 26, 2021, and inquired as to the relationship between the sinus infection of January-February, 2020, and the subsequent lung infection:

> Q. Obviously we have him having the sinus infection and then we seem to have some problems with the lungs, and it looks like this process is going well through March and April, May of 2020. And that's what I'm trying to understand is when we see this treatment subsequent to his sinus surgery -- I think the sinus surgery

was in February of 2020 -- do you think that there is a nexus in terms of that subsequent treatment regarding the sinuses and the lungs and the hospitalization back to his original infection and subsequent surgery?

A. I would say based on the best information I have using the information he gave me and also the medical records that this all seems like one continuous infection that started in his sinuses and eventually spread to his lung. And the reason I say that is because I didn't see or he didn't tell me about a distinct period of recovery from that original infection he suffered towards the end of December of '19. So because he never really got better from that first infection, my suspicion based on all the information is that it's one prolonged event. (Ex. X2, transcript of the deposition of Mufaddal Dahodwala, M.D., dated February 26, 2021, at 10:16.)

Dr. Dahodwala also confirmed that the *Citrobacter koseri* is transmissible via contact with blood:

Q. You had mentioned that the bacteria can get within the bloodstream. Did I hear that correct?
A. Yes.
Q. Okay. That bacteria can survive within the blood.
A. It can.
Q. Okay. Now, the question is, are you familiar in terms of Enterobacteria in general since it seems like the *C. koseri* is a little bit more rare – in Enterobacteria in general, can that bacteria be transmitted via blood exposure?
A. If there is lots of blood contact, then yes, there is a possibility within reasonable medical probability that that transmission could occur. Enterobacter can also be a cause of sepsis which is, you know, a bacterial infection in the blood leading to multisystem damage. So, yes, that can happen. (*Id.* at 22:7.)

However, the QME noted that surface contact was the more common method of transmission:

Q. Is it transmitted similarly like a standard flu or cold, you know, where you're looking for somebody who's coughing, sneezing type thing or is this something that we're looking at as transmission on objects to being touched kind of thing? Help me out.

A. I think the predominant way is through surface touching or ingestion. So like I mentioned before, you can have transmission through food or water. That's why you can have Enterobacter infection by eating street food, for example, when you go to a country where they're not as careful about hygiene when they're cooking on the street. And you can also have hospital-based transmission from surfaces. So dirty doorknobs, right, if someone didn't wash properly after going to the bathroom and then that transmission then gets to a mucosal surface of a patient, and now all of a sudden that patient has the infection. So it's not so much airborne as you would think of like the flu or COVID-19, for example, but

> it's more either ingestion or surface transmission to the best of my knowledge. (*Id.* at 23:4.)

The QME summarized his opinion regarding transmission of the bacteria as follows:

> Q. So I believe earlier, Doctor, counsel said that it is possible that this particular bacteria could be transmitted by blood, and you agreed; is that right?
> A. Yes, blood-to-blood transmission is one of the ways that that bacteria can be transmitted, correct.
> Q. So would you consider it a bloodborne pathogen?
> A. I would say it's possible. I mean, it depends how you're defining bloodborne pathogen, but it is possible that you can transmit this bacteria from one person to another via a blood route.
> Q. But you said predominantly surface touching and more ingestion; is that right?
> A. Correct. (*Id*. at 36:7)

The parties proceeded to trial on June 8, 2021, framing issues of injury AOE/COE, the date of injury, and the applicability of the presumption of section 3212.8. The WCJ issued the F&A on June 29, 2021, finding in pertinent part that applicant sustained the burden of proof to establish injury during the period December 18, 2019 through January 9, 2020, and that applicant's injury was presumed to arise out of and in the course of employment pursuant to Labor Code section 3212.8. (F&A, Findings of Fact, Nos. 1 and 2.)

Defendant contends applicant's trial testimony was not credible, noting applicant did not disclose to multiple treating and evaluating physicians that he had searched through the suspect's bloody belongings. (Petition, at 3:22.) Defendant also contends that "the presumption under section 3212.8 applies only to diseases that are transmitted via contact with blood, rather than so broadly as to include any organism that can travel within the bloodstream of its host." (*Id*. at 6:7.) Defendant further cites to the unpublished decision in *DuFour v. WCAB, City of Modesto* (2007) 72 Cal.Comp.Cases 1081 [2007 Cal. Wrk. Comp. LEXIS 266], to support its position that the evidence does not establish blood contact necessary to transmit the infection. (*Id.* at 5:7.) Finally, defendant contends that if the presumption of section 3212.8 is inapplicable, the evidence does not support a finding of injury AOE/COE, as applicant has not established when, where or how the bacteria was transmitted. (*Id.* at 7:13.)

The Answer responds that applicant acted reasonably in not discussing the specifics of his search of the suspect's belonging with his physicians, owing to the need for discretion regarding an ongoing investigation. (Answer, at 2:25.) Applicant cites to *County of Orange v. Workers'*

Comp. Appeals Bd. (Azoulay) (2017) 82 Cal.Comp.Cases 378 [2017 Cal. Wrk. Comp. LEXIS 28] (writ denied) (Azoulay) in support of its argument that a pathogen need not *originate* in the blood to trigger the presumption of section 3212.8. (Answer, at 4:17.) Finally, applicant contends that the defendant has not rebutted the presumption of industrial injury. (*Id.* at 6:20.)

In his Report, the WCJ notes applicant's testimony at trial was fully credible, and that applicant's reticence to discuss the specific details of an ongoing criminal investigation (e.g. the contents of the suspect's travel bag) with his treating physicians to be both reasonable and reflective of professional standards. (Report, at p. 3.) The report observes that the most likely scenario for exposure to the infectious bacteria was applicant's work activities. (*Id.* at p. 4.) Accordingly, the WCJ found that applicant met the burden of proving injury AOE/COE.

DISCUSSION

Labor Code sections 3212 through 3213 contain a series of statutory presumptions regarding the industrial nature of various injuries applicable to certain public safety officers. "These presumptions provide that when specified public employees develop or manifest particular injuries or illnesses, during their employment or within specified periods thereafter, the injury or illness is presumed to arise out of and in the course of their employment." (*City of Long Beach v. Workers' Comp. Appeals Bd.* (Garcia) (2005) 126 Cal.App.4th 298, 310-311 [70 Cal.Comp.Cases 109].) Their purpose is to provide additional compensation benefits to employees who provide vital and hazardous services by easing their burden of proof of industrial causation. (*Ibid.*)

Section 3212.8 creates a rebuttable presumption of industrial causation in favor of various public safety employees, including police officers such as applicant herein. Section 3212.8 provides, in relevant part:

> (a) In the case of members of a sheriffs office, of police or fire departments of cities, counties, cities and counties…the term "injury" as used in this division, includes a blood-borne infectious disease…when any part of the blood-borne infectious disease…develops or manifests itself during a period while that person is in the service of that office, staff, division, department, or unit. The compensation that is awarded for a blood-borne infectious disease…shall include, but not be limited to, full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by the workers' compensation laws of this state.
> (b)(1) The blood-borne infectious disease…so developing or manifesting itself in those cases shall be presumed to arise out of and in the course of the

> employment or service. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it.
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> (c) The blood-borne infectious disease…so developing or manifesting itself in those cases shall in no case be attributed to any disease…existing prior to that development or manifestation.
>
> (d) For the purposes of this section, "blood-borne infectious disease" means a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans, including those pathogenic microorganisms defined as blood-borne pathogens by the Department of Industrial Relations.

The statute thus affords the presumption of industrial causation in cases of blood-borne infectious disease or methicillin-resistant Staphylococcus aureus skin infection that develop or manifest during employment, unless controverted by other evidence. However, such rebuttal cannot be "attributed to any disease existing prior to such development or manifestation." (Lab. Code § 3212.8(c).)

Applicant contends that his bacterial infection developed or manifested during his employment, and that the pathogens causing the infection are themselves transmissible via contact with blood. However, because of the difficulty in proving the source of transmission, applicant argues that the infection need not *originate* in the blood so long as the pathogen is capable of being *carried* or *transmitted* in the blood.

In support of this argument, applicant cites to the writ-denied panel decision in *Azoulay, supra,* 82 Cal.Comp.Cases 378.[4] In *Azoulay*, applicant alleged injury in the form of diverticulitis and scarring of the skin, and the parties stipulated that applicant was among the class of employees for whom the presumption of section 3212.8 was available. The AME opined that applicant's diverticulitis arose out of bacterial infection transmitted from a burst diverticula in the colon. The AME found that the development of the underlying diverticula was a nonindustrial, degenerative

[4] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

condition, and that in the absence of other industrial risk factors, the resulting diverticulitis was nonindustrial. (*Id*. at 380.) Applicant contended that because the burst diverticula resulted in bacteria entering the bloodstream, and that bacteria in the bloodstream met the definition of "developing or manifesting" under section 3212.8, the condition was presumptively industrial. The WCJ followed the AME opinion and issued Findings of Fact determining the condition to be nonindustrial, and applicant petitioned for reconsideration.

Our analysis in *Azoulay* began with the statutory definition of a blood-borne infectious disease, "a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans." (Cal. Lab. Code § 3212.8(d).) We observed that per the findings of the AME, and the plain meaning of the statutory language, when applicant's diverticula burst and spread bacteria to applicant's blood, applicant was exposed to pathogenic organisms that were present in human blood and that caused disease in applicant. We further observed that the accepted definition of the word "blood-borne" does not mean "originating in the blood" or "originating in a blood disease like hepatitis," as contended by defendant, but rather "carried or transmitted by the blood." (*Azoulay, supra,* 82 Cal.Comp.Cases 378, 381.) Consequently, we determined that applicant's disease was caused by exposure to pathogenic microorganisms present in the human blood that can cause disease in humans, and that the presumption of section 3212.8 applied.

Here, as in *Azoulay*, the plain language of section 3212.8 compels a finding that applicant has sustained a presumptively compensable injury. There is no dispute that applicant is among the classes of employees for whom the presumption of section 3212.8 is available, or that the infection arose or manifested during applicant's employment. (Lab. Code § 3212.8, subd. (a), (b).) The medical record establishes that applicant's sinus and lung infections were the result of exposure to the pathogenic microorganism *Citrobacter koseri.* The QME confirms that *Citrobacter koseri* is transmissible via the blood. (Ex. X2, Transcript of the Deposition of Mufaddal Dahodwala, M.D., dated February 26, 2021, at 36:7.) Applicant has thus sustained an infection as a result of a bacteria that can be carried in the blood, with applicant's infectious disease caused by "exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans." (Lab. Code § 3212.8(d).) Applicant has met the burden of proof necessary for the presumption of industrial causation to attach, and the burden of proof now shifts to the defendant to affirmatively

controvert the presumption, or we are "bound to find in accordance with [the presumption]." (Lab. Code § 3212.8(b)(1).)

Defendant's Petition asserts that "the only certain thing that can be said of the medical legal evaluator's testimony is that the timing and transmission of the infection was uncertain," and that applicant could have contracted the bacteria from picking up his children from school or shopping for groceries. (Petition, at 8:1.)

However, this argument misapprehends the nature of the operative presumption. The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact. (Evid. Code, § 606; *City of Long Beach v. Workers' Compensation Appeals Bd. (Garcia*), *supra*, 126 Cal.App.4th 298, 314.) Accordingly, 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." (*Gillette v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 312 [36 Cal.Comp.Cases 570].) It thus falls to defendant to establish that applicant's blood-borne illness did not arise out of and in the course of employment. Speculation that applicant could have acquired the infection outside of his work activities does not meet the affirmative burden of proof required to controvert the presumption. (*Zipton v. Workers' Comp. Appeals Bd.* (1990) 218 Cal.App.3d 980, 988, fn. 4 [55 Cal.Comp.Cases 78] ["[w]here facts are proven giving rise to a presumption under one of these statutes, the burden of proof shifts to the party, against whom it operates, to *prove the nonexistence* of the presumed fact, to wit, an industrial relationship"].)[5]

In the absence of evidence that affirmatively controverts the presumption, defendant has not met its burden of proof, and we are bound to find in accordance with the presumption of industrial injury. (Lab. Code § 3212.8(b)(1).)

Additionally, we observe that defendant cites to the unpublished decision of *DuFour v. Workers' Comp. Appeals. Bd.* (2007) 72 Cal. Comp. Cases 1081 [2007 Cal.Wrk.Comp. LEXIS 266] multiple times in its Petition. We remind defense counsel that California Rules of Court, rule 8.1115(a), provides that unpublished cases, "must not be cited or relied on by a court or a party in any other action."

[5] Even were this not the case, applicant testified to no specific recollection of transporting either children or groceries in December, 2019. (Minutes, at 6:9.) The WCJ found applicant's testimony to be fully credible, a determination to which we accord great weight. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)

In summary, we conclude that because applicant was a member of the class of employees for whom the presumption of section 3212.8 applies, and because applicant developed a disease caused by a blood-borne pathogen, the injury is presumptively industrial. We further conclude that defendant has not met its affirmative burden of rebutting the presumption.

Accordingly, we affirm the June 29, 2021 F&A.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 29, 2021 Findings and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 7, 2023

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

CHRISTOPHE LELONG
ADAMS FERRONE & FERRONE
LAW OFFICES OF ALLWEISS, MCMURTRY & MITCHELL

SAR/abs

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