WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JAMES CLEVENGER, ***Applicant***

vs.

CALIFORNIA HIGHWAY PATROL,
ADMINISTERED BY STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Number: ADJ14048813
Stockton District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the April 19, 2023 Findings of Fact, Orders and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a California Highway Patrol Officer on October 19, 2020, sustained industrial injury in the form of COVID-19-related illness. The WCJ found that the presumption of industrial causation found in Labor Code section 3212.87 was applicable, and that defendant had not overcome the presumption.

Defendant contends the WCJ erred in not addressing the date of onset of applicant's symptoms; that applicant's testimony is not reliable; and that defendant has rebutted the presumption of industrial injury.

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

FACTS

Applicant claims injury in the form of COVID-19-related illness while employed as an officer by defendant California Highway Patrol on October 19, 2020. Defendant denies injury.

On October 10, 2020, applicant worked his usual shift for defendant, prior to taking vacation starting on October 11, 2020. (Ex. 1, Report of Omar Tirmizi, M.D., April 10, 2021, at p. 2; Petition for Reconsideration (Petition), May 9, 2023, at p. 2:3; Answer, at 2:6.)

On October 14, 2020, applicant traveled to Las Vegas, returning on October 19, 2020.

On October 23, 2020, applicant was diagnosed with COVID-19, and on October 25, 2020, applicant was hospitalized for four days for treatment of COVID-19-related symptoms. (Ex. 1, Report of Omar Tirmizi, M.D., April 10, 2021, at p. 2.)

On December 30, 2020, applicant filed an Application for Adjudication, alleging injury to the lungs, pulmonary system and neurologic system, and in the form of COVD-19-related illness.

The parties selected Omar Tirmizi, M.D., as the Qualified Medical Evaluator (QME). On April 10, 2021, Dr. Tirmizi issued his first report. Applicant reported that he felt unwell and had flu-like symptoms as of October 10, 2020, and "felt unwell enough to go and purchase some Allegra from Walgreens." (Ex. 1, Report of Omar Tirmizi, M.D., April 10, 2021, at p. 2.) Following his last day worked on October 10, 2020, applicant travelled to Las Vegas, returning on October 19, 2020. Applicant reported that "on the day he returned back, he felt especially unwell," and applicant stayed in bed for several days. Applicant was first formally diagnosed with COVID-19 on October 23, 2020, and was later admitted to the Sutter Amador Hospital for four days beginning October 25, 2020. (*Ibid.*) Dr. Tirmizi reviewed applicant's clinical findings and opined:

> Mr. Clevenger contracted COVID-19 in the days and weeks leading up to his onset of symptoms on 10/10/20. This is an important detail that he was actually symptomatic on his last day of work. Therefore, it is my opinion that the causation of COVID-19 is industrial, He was assisting civilians in various aspects of care, 6 to 8 times per shift. He is a first responder.
>
> (*Id. at p. 4.)*

On July 15, 2021, Dr. Tirmizi reviewed additional records, and further noted that, "[t]he typical incubation period for COVID-19 has been reported to be anywhere from four to five days from exposure to symptom onset, however, may extend to 14 days with a median time of four to five days from exposure to symptom onset." (Ex. 1, Report of Omar Tirmizi, M.D., July 15, 2021,

at p. 2.) Noting that applicant experienced symptoms as early as October 12, 2020, the QME affirmed his prior opinion of industrial causation. (*Ibid.*)

On October 7, 2021 and October 6, 2022, the parties undertook the deposition of Dr. Tirmizi, who was questioned in detail regarding the incubation period for COVID-19 following exposure. (Ex. 2, Transcript of the deposition of Omar Tirmizi, M.D., dated October 6, 2022, at 78:11.) Dr. Tirmizi was asked to comment on several studies exploring the relationship between exposure to the COVID-19 virus and the onset of symptoms:

> Q. Okay. So given this study's conclusion that the most common onset of symptoms of COVID-19 including cough and fever first, do you think it was more likely that he did not have COVID-19 prior to that onset when he returned from vacation?
> A So one of the biggest mistakes I see made is that one looks at an epidemiological study and applies it to individual patients. These studies, which are epidemiological studies, look at trends. They don't look at every single symptom in every single patient.
> Q Are you saying they're not useful?
> A They're useful to look at epidemiological data but not when it comes to evaluating patients or treating them and making a diagnosis.
> Q So you are saying the study has no value as far as your assessment of the onset of the COVID-19 in this case?
> A Absolutely a hundred percent.
>
> (*Id.* at p. 80:3.)
>
> * * * * *
>
> THE WITNESS: So if he tested positive on October 23rd, he contracted the virus between typically 5 to 7 days before, but it could be as early as 14 days before the 23rd.
> Q BY MS. MARTINEZ: And so whatever symptoms he was having prior to that, in your mind, are not important because each individual is different; is that right?
> A Well, I'm not going to make a diagnosis on one or two symptoms. Yes, you take all the symptoms and associate them with what's going on, but I can't say just because he wasn't sneezing he didn't have COVID, for instance.
> Q Right. But you can't say that he did have COVID because he was sneezing; correct?
> A No. You cannot put a single symptom and say that's diagnostic of a disease. The diagnosis is based on a PCR test.
>
> (*Id.* at p. 82:5)

* * * * *

Q So would you agree then that there is -- let's see here. So he went on vacation on he went on vacation on October -- his first day of vacation was October 11th of 2020; correct?
A Okay.
Q Okay. He tested positive on the 23rd. So that's 13 days; correct?
A Yes.
Q Yeah. That's 13 days. All right. So if we are looking at 13 days, and all of these numbers -- so 13 days down to one day, would you agree that there is a -- well, let's see here. It says here the 90th percentile is 11 days. There is a 90 percent chance -- we are talking you statistically there is a 90 percent chance he got it within the time that he was on vacation. Would you agree with that?
A Well, I think that's one way of putting it. The other of putting it is -- if you show me that graph again that you were showing me, the incubation period of days. Yeah. If you look at that bar that says 14, what does that mean? It means that a certain number of people tested positive after 14 days.
Q Exactly. But what is the standard that you use for reasonable medical probability?
A That anybody testing within a certain time frame would be considered to have COVID-19, and the data indicates the vast majority will test positive within 14 to 16 days.

(*Id.* at p. 94:15.)

Following the above discussion of incubation periods, defense counsel posed the following hypothetical to the QME:

Q So for the purpose of this question that I'm going to ask you, please assume that the trier of fact finds that the onset of his symptoms, so the first onset of that symptom of COVID-19 was on October 20th of 2020; okay? Hold on. I presented you with significant data, medical reports and his own statements that indicate it was October 20th. So I want you to just assume that a trier of fact accepts that for the time being; okay? So if we have the onset of symptoms 10-20-20 at 1:30 a.m. That's according to his deposition when he first felt very unwell. 6 days before that would be October 14th, 2020 at 1:30 a.m., and 7 days would be October 13th; correct?
A Yes.
Q Okay. So either way, he was on vacation; correct?
A Yes.
Q So statistically there is like a 75 percent chance that he got it within 6 or 7 days; correct?
A Yes.
Q Okay. According to the history, he was not working during that time; correct?

A Yes. Yes.
Q Okay. So would you agree that it's reasonably medically probable that applicant's COVID-19 infection was a result of a non-industrial exposure?
A Well, if the trier of fact is deciding that there was no COVID symptoms prior to October 20th, 2020, then it would make the likelihood of his exposure as being non-industrial significantly higher than industrial as he was on vacation in the expected incubation time period.

(*Id.* at p. 93:17.)

On March 2, 2023, the parties proceeded to trial, and stipulated that the section 3212.87 presumption of industrial injury applied. The parties placed in issue whether applicant sustained injury arising out of and in the course of employment (AOE/COE), whether the reporting of the QME was substantial, whether the reporting of the QME evinced bias in favor of applicant, and whether the presumption of injury was rebutted by defendant. Applicant and the claims examiner testified, and the parties submitted the matter for decision.

On April 19, 2023, the WCJ issued the F&A, determining that the presumption of section 3212.87 applied, and that defendant had not overcome the presumption of injury. The WCJ entered a finding that applicant sustained injury AOE/COE, accordingly.

Defendant's Petition avers the WCJ erred in failing to address the issue of the date of onset of applicant's symptoms and that applicant's testimony was internally inconsistent and otherwise not credible. (Petition, at p. 3:24; 4:15.) Defendant further contends that there is no evidence that applicant was exposed to COVID-19 at work, that applicant engaged in activities with a heightened risk of COVID-19 exposure while on vacation, and that if applicant's symptoms began on October 20, 2020, the QME agreed that the COVID-19 exposure was most likely nonindustrial. (Petition, at p. 11:4; 14:4)

Applicant's Answer avers that the history provided by applicant of symptoms as early as October 9, 2020 has been consistent, and was properly relied upon by the WCJ. (Answer, at p. 4:3.)

DISCUSSION

Labor Code[1] sections 3212 through 3213 contain a series of statutory presumptions regarding the industrial nature of various injuries applicable to certain law enforcement personnel,

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

specified first responders, or other critical workers. "Generally, the provisions rebuttably presume an industrial causation between various injuries and diseases—such as hernia, heart trouble, pneumonia, cancer, tuberculosis, meningitis, or Lyme disease—sustained by the enumerated classes of public safety officers while or within a specified period of time so employed." (*California Dep't of Corrections & Rehabilitation v. Workers' Compensation Appeals Bd. (Garza)* (2009) 74 Cal.Comp.Cases 134, 138 [2009 Cal. Wrk. Comp. LEXIS 18].)

The legislative intent behind the enactment of these presumption statutes was to "provide additional compensation benefits to employees who provide vital and hazardous services by easing their burden of proof of industrial causation." (*City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 310-311 [70 Cal.Comp.Cases 109], citing *Zipton v. Workers' Comp. Appeals Bd.* (1990) 218 Cal.App.3d 980, 988, fn. 4 [55 Cal.Comp.Cases 78], and *Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd. (Smith)* (1994) 23 Cal.App.4th 1120, 1123-1124 [59 Cal.Comp.Cases 180].)

Section 3212.87 contains presumptions applicable to COVID-19 illness, and applies to specific classes of employees, including "[a]ny member of the Department of the California Highway Patrol." (Lab. Code, § 3212.87(a)(5); Pen. Code, § 830.2(a).) The statute provides in pertinent part:

> (b) The term "injury," as used in this division, includes illness or death resulting from COVID-19 if all of the following circumstances apply:
>
> > (1) The employee has tested positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction.
> >
> > (2) The day referenced in paragraph (1), on which the employee performed labor or services at the employee's place of employment at the employer's direction, was on or after July 6, 2020. The date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction prior to the positive test.
>
> (c) The compensation that is awarded for injury pursuant to this section shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

* * * * *

> (e) An injury described in subdivision (b) is presumed to arise out of and in the course of the employment, except as provided in this subdivision. This presumption is disputable and may be controverted by other evidence. Unless controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a person described in subdivision (a) following termination of service for a period of 14 days, commencing with the last date actually worked in the specified capacity at the employee's place of employment as described in subdivision (b).
>
> (Lab. Code, § 3212.87.)

The parties do not dispute that the presumption of industrial causation described in section 3212.87 attaches herein. (Minutes, at 2:13.) However, pursuant to subdivision (e), the presumption may be controverted by "other evidence." (Lab. Code, § 3212.87(e).) 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 COVID-19 related illness did not arise out of and in the course of his employment. If defendant is unable to successfully controvert the presumption of industrial causation, we are "bound to find in accordance with the presumption." (Lab. Code, § 3212.87(e).)

Defendant contends "there is no evidence of industrial exposure to COVID-19," because applicant could not recall coming into contact with other employees of the CHP or members of the public known to have contracted COVID-19 at the time. (Petition, at p. 9:5.) However, the presumption statute relieves applicant of the burden of proving injury AOE/COE, because so long as the conditions of the statute are met, injury is presumed to be industrial.

Defendant contends that applicant's participation in the building of a shed and subsequent travel to Las Vegas "placed him at risk of nonindustrial exposure to COVID-19." (*Id.* at 10:5.) However, defendant offers no medical or other evidence confirming exposure, and interposes no witnesses to substantiate the alleged risks of infection. Defendant offers only its own surmise as to activities it considers to represent a heightened risk of COVID-19 infection. However, mere speculation as to alternate infection vectors is insufficient to satisfy defendant's affirmative burden to overcome the presumption of injury. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d

162 [36 Cal.Comp.Cases 93]; *Zipton v. Workers' Comp. Appeals Bd.* (1990) 55 Cal.Comp.Cases 78 (1990 Cal. Wrk. Comp. LEXIS 2323]; *Sevillano v. State of California/IHSS* (September 22, 2022, ADJ13511723) [2022 Cal. Wrk. Comp. P.D. LEXIS 255].)

Defendant contends that pursuant to the deposition testimony of Dr. Tirmizi, "if applicant's symptoms of COVID-19 started on 10/20/20, applicant's COVID-19 was most likely nonindustrial." (Petition, at p. 11:4.) However, section 3212.87 neither requires the presence of symptoms, nor does it contemplate an incubation period. Rather, the presumption of section 3212.87 attaches based on a diagnosis of COVID-19 occurring after July 6, 2020, and made within 14 days after "a day that the employee performed labor or services at the employee's place of employment at the employer's direction." (Lab. Code, § 3212.87(b)(1).) The statute presumes industrial causation, irrespective of when, or if, symptoms arose.

Defendant asserts applicant's trial testimony was not reliable. Applicant testified that he first experienced symptoms as of October 9 or 10, 2020. (Minutes, at p. 5:1.) In support of its argument that the date of onset of applicant's symptoms overcomes the presumption of injury, defendant avers that applicant's trial testimony is inconsistent and not credible, and that the date of his first symptoms was October 20, 2020. (Petition, at p. 4:16.) Defendant asserts that "all six of the medical reports related to applicant's COVID-19 illness generated in the first six weeks after his diagnosis document symptom onset of 10/20/20." (Petition, at 14:4.)

However, defendant's own evidence demonstrates applicant's timely contemporaneous reporting of symptoms beginning on October 9 or 10, 2020. Defendant's claims examiner Cheryl Hodel requested additional information regarding applicant's claim on or about November 17, 2020, and the claim note documents applicant's response that he "first felt symptoms and thought [he] had allergies" on October 9, 2020 to October 10, 2020. (Ex. 2, Claim Note, November 17, 2020, at p. 1.) We also observe that applicant's reporting to the QME was consistent with his timeline as discussed with Ms. Hodel. In his initial report of April 10, 2021, Dr. Tirmizi documented applicant's history of complaints:

> He states that on 10/10/20, he felt unwell and had flu-like symptoms. He felt unwell enough to go and purchase Allegra from Walgreens; although, specifically, he would only have allergy symptoms in the spring months. He continued to feel mildly unwell with flulike symptoms. In fact, when he spoke with a sergeant's wife on 10/12/20, he was reported to say that he was feeling unwell and maybe coming down with something. Mr. Clevenger then continued to feel unwell, but not enough to change his plans.

(Ex. 1, Report of Omar Tirmizi, M.D., April 10, 2021, at p. 2.)

We further observe that the QME was clear and consistent in his assessment that applicant's exposure was, to a reasonable medical probability, industrial in nature. In his initial report, Dr. Tirmizi reviewed the sequential events leading up to the COVID-19 diagnosis on October 23, 2020, and concluded that applicant "contracted COVID-19 in the days and weeks leading up to his onset of symptoms on 10/10/20." (*Id.* at p. 4.) And while defendant posed a hypothetical to the QME in deposition regarding his opinion as to causation if symptoms did not arise until October 20, 2020, Dr. Tirmizi was clear that that hypothetical would require the trier of fact to "ignore" applicant's symptoms that occurred before October 10, 2020. (Ex. 2, Transcript of the deposition of Omar Tirmizi, M.D., dated October 6, 2022, at 97:5)

Moreover, in workers' compensation proceedings, a WCJ's credibility determinations are "entitled to great weight because of the [WCJ's] 'opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand …." (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Only evidence of considerable substantiality would warrant rejecting the WCJ's credibility determination. (*Id.* at pp. 318-319.)

Following our review of the record occasioned by defendant's Petition, we discern no good cause to reject the WCJ's assessment of credibility. Defendant's selective citation to the evidentiary record does not rise to the level of "evidence of considerable substantiality," and we decline to disturb the WCJ's findings as to witness credibility, accordingly.

In summary, there is no dispute that the presumption of industrial injury attaches to applicant's claim of injury. The QME and the WCJ have both determined that applicant's account of the events leading up to his COVID-19 diagnosis on October 23, 2020 is consistent and credible. Defendant has offered no evidence of considerable substantiality to controvert the WCJ's credibility determination, and the limited hypothetical posed by defendant to the QME is contradicted in the facts established in the evidentiary record. Defendant has not met its burden of overcoming the presumption of industrial injury of section 3212.87. We deny the defendant's Petition, accordingly.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ NATALIE PALUGYAI, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 10, 2023

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

JAMES CLEVENGER
MARCUS, REGALADO, MARCUS & PULLEY
STATE COMPENSATION INSURANCE FUND

SAR/abs

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