

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

EMILIO EDDIE ROMERO (deceased), *Applicant*

vs.

**CLOROX PRODUCTS MANUFACTURING COMPANY; AIG RM, adjusted by
GALLAGHER BASSETT SERVICES, *Defendants***

**Adjudication Numbers: ADJ10894605; ADJ7028149; ADJ6520242;
ADJ4052884 (AHM 0136124)
Anaheim District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration 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.¹

Defendant Clorox Products Manufacturing Co., by and through its insurer, AIG RM, filed a Petition for Reconsideration from the Joint Findings, Award and Order, issued August 31, 2020, wherein the workers' compensation administrative law judge (WCJ) found that Emilio Eddie Romero, while employed as a maintenance mechanic by Clorox Products, sustained industrial injuries resulting in his death on November 1, 2008, and awarded death benefits to his dependent widow. The WCJ relied upon the reporting of Dr. Hirsch, which he found to be "far more thorough and well-reasoned" than the reporting of defendant's medical expert, Dr. Sachs.

Defendant contests the WCJ's determination, contending that applicant failed to meet his burden of proof to establish a causal connection between his employment and the cause of death. Further, defendant argues that the finding of industrial causation is not justified because applicant's death from idiopathic pulmonary fibrosis has not been causally linked to his employment.

¹ The composition of the panel has changed due to the unavailability of one of its members.

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

We have considered the allegations and arguments of the Petition for Reconsideration, as well as the Answer thereto, and have reviewed the record in this matter and the WCJ's Joint Report dated October 9, 2020, which considers, and responds to, each of the defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Joint Report, which we adopt and incorporate as the decision of the Board, we will affirm the Joint Findings, Award and Order.

As the WCJ explained in both the Opinion on Decision and the Joint Report, he found the considered opinion of Dr. Hirsch to be most persuasive. Dr. Hirsch relied on the material data safety sheets, provided by defendant, to conclude that applicant's industrial exposure to chemicals known to be pulmonary hazards contributed to his industrial injury and death. Dr. Hirsch's opinion was based upon application of the correct legal standard of reasonable medical probability.

In contrast, defendant urges reliance upon the opinion of Dr. Sachs, who found insufficient evidence of industrial exposure due to the lack of a quantifiable amount of applicant's chemical exposure over his years of employment.

The WCJ properly exercised his authority to conclude that Dr. Hirsch's reporting constituted the most persuasive medical evidence. It is well settled that the WCJ as the trier of fact has the power to choose from among conflicting medical reports, those which he deems most appropriate (*Jones v. Workers' Comp. Appeals Bd.* (1968) 86 Cal.2d 476 [33 Cal.Comp.Cases 221]), and the relevant and considered opinion of one doctor may constitute substantial evidence even though inconsistent with other reports in the record. (*Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Smith v. Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 588, 592 [34 Cal.Comp.Cases 424]; *Patterson v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 916, 921 [40 Cal.Comp.Cases 799].)

Accordingly, we affirm the WCJ's determination.

For the foregoing reasons,

IT IS ORDERED that, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Joint Findings, Award and Order, issued August 31, 2020, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 14, 2021

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

**SARA ROMERO
MOORE & ASSOCIATES
STANDER REUBENS THOMAS KINSEY**

SV/pc

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

JOINT REPORT AND RECOMENDATION ON
PETITION FOR RECONSIDERATION

I

INTRODUCTION

The defendant by and through their attorney of record filed a timely, verified Petition for Reconsideration to this court's Joint Opinion on Decision, Findings, Award and Order served 8/31/20, finding the Applicant's death was industrially related to his employment with Clorox Manufacturing Co. (hereinafter Clorox). The applicant's attorney has filed a reply to the Petition for Reconsideration.

II

BACKGROUND

The underlying cases began with the filing of two intervivos applications for adjudication of claim. On 10/23/08 in ADJ6520242, the applicant filed a claim alleging a continuous trauma injury of 1/1/64-12/21/08 for pulmonary fibrosis, in ADJ4052884 he filed a specific injury claim on 4/27/06 for a 3/10/06 date of injury, and in ADJ7028149 his wife filed a death claim on 11/3/09 following the applicant's death on 11/1/08 for the continuous trauma related to exposure to pulmonary irritants. The record shows the applicant died from an idiopathic pulmonary fibrosis (hereinafter IPF). The parties went to Dr. Leonard as a PQME. After trial on the admissibility of Dr. Leonard's reports, the court ordered Dr. Leonard's reports stricken from the record. The parties then requested a new panel from the medical unit and were advised that the request could not be filled. The parties agreed to select their own QMEs. These reports were obtained and the matter was submitted for trial on the issue of whether or not the applicant's death was industrially related to his employment at Clorox. After review of the record as a whole including the evidence previously submitted, with the exception of Dr. Leonard's reporting being excluded, the new medical evidence submitted, the depositions, the trial testimony of the applicant's widow, Sara Romero, the court found that the applicant's death was related to the applicant's employment with Clorox. The Court further found that there were two total dependents, applicant's wife, Sara Romero and his mother-in-law who lived with them at the time of his death were total dependents. The court awarded the \$5,000.00 death benefit for burial expenses and all other issues were deferred. It is from these findings that defendant filed its timely verified Petition for

Reconsideration contending the record did not support the finding the exposure at Clorox caused the applicant's death.

III

DISCUSSION

Defendant's contention in the petition for reconsideration is that the applicant did not meet her burden and prove that her husband death was related to his employment at Clorox. Defendant also contends that the reporting of Dr. Sachs is more accurate than that of Dr. Hirsch. The court found the applicant met her burden and that the reporting of Dr. Hirsch was far more persuasive on injury AOE/COE than the reporting of Dr. Sachs. The doctors must look at the record as a whole; the court does not believe Dr. Sachs did. As indicated in the opinion on decision, one of the issues the court wanted the doctors to address base on its prior orders for developing the record was, was the applicant's death related to his exposure to the chemicals at Clorox. Did it cause, contribute to, or hasten the applicant's demise in any way. Dr. Sachs made a finding that the applicant's death was not caused by his employment. He never addressed whether or not the applicant's death from IPF was accelerated by, contributed to, or hastened by his exposure to chemicals at work. He also opined that since the exposure cannot be quantified it could not be a factor. The applicant's testimony through deposition and the widow's testimony at trial speak of some of the things the applicant was exposed to. Per the deposition, it was more than just chlorine as claimed by the defendant in the petition for reconsideration. He also mentioned asbestos. He used asbestos blanket to protect pipes and when welding. Asbestos is a known cause of pulmonary conditions. Dr. Sachs and the defense completely ignore this exposure. Clorox produced the MSDS sheets for the chemicals the applicant was known to use and be exposed to. They did not produce a witness to rebut the testimony of the decedent or his wife. Once the exposure is shown the burden shifts back to the defense to rebut the exposure. Dr. Sachs belief, as made clear in his reporting, that unless the exposure can be quantified it cannot be used to prove the exposure. This is not the correct standard to use in evaluating the evidence. Though contended by defendant in the petition that Dr. Sachs addressed aggravation, the court believes he did not, he only says that there is no actual evidence of exposure and therefore there can be no aggravation. Does someone with Mesothelioma have to show the exact amount of asbestos inhaled to prove industrial exposure? No, this is not the standard used. Sometimes industrial exposure cannot be quantified as in this

case. No one is there measuring the amount of fumes, gases of other pulmonary irritants the applicant is being exposed to or that he has inhaled over his 37-year employment with Clorox.

The applicant's treating doctors don't mention causation because they were not asked to nor did they know the extent of his work duties or were they ever given the evidence to make a determination if the applicant's condition was industrial or in any way related to his exposure to the chemicals at work.

The court found the applicant met her burden by a preponderance of the evidence under Labor Code §3202.5. The court evaluated the evidence and weighed the evidence and gave it is due consideration. The over whelming evidence showed that the applicant's un rebutted testimony showed exposure to numerous chemicals and the reporting of Dr. Hirsh was far more persuasive than Dr. Sachs and more convincing and showed a greater probability for the truth. The applicant produced prima facie evidence the applicant's death arose out of and occurred during the course of his 37-year employment at Clorox as a maintenance man.

In Section B of defendant's petition, it talks about the death certificate. The death certificate was never filed with the court as evidence. Any reference to it is pure speculation. Further, without an autopsy the death certificate will list the probable cause of death but not necessarily the actual cause of death. Defendant also contends in this section that the court's opinion is pure speculation since it relied on Dr. Hirsh's reporting. Dr. Sach's reporting is not complete, it fails to address all the issues related to the applicant's death while Dr. Hirsh's report does. Dr. Hirsh's report is not speculation but based on sound medical reasoning. The applicant based on the MSDS records produced by and un rebutted by the defendant showed that of the 304 MSDS sheets produced over 100 were known to cause some type of pulmonary irritation. Dr. Sach's states this does not matter as the applicant cannot quantify and calculate the exact exposure to each chemical over his 37-year employment history. Dr. Hirsh finds this exposure contributed and accelerated the applicant's death. He also found that the applicant's exposure to asbestos might be the cause of the IPF, as asbestos is known to cause pulmonary fibrosis. The applicant's exposure to these harmful chemicals is un rebutted by the defendant. Again without an autopsy, we really do not know the exact cause of the applicant's death.

The court's opinion was based on substantial medical and testimonial evidence in light of the entire record. *Le Vesque v. WCAB* (1970) 1 CAL.3d 627. Substantiality of the record is based on the entire record not just on one piece of the evidence as defendant would have the court believe.

Dr. Hirsh's report is based on the record as whole while Dr. Sach's report is not. Dr. Sachs chose to use his own subjective view of the evidence rather than an objective view of the evidence itself. He opined that unless the applicant can quantify the exposure to the chemicals no exposure existed. This is not what the evidence showed. Evidence that is reasonable, credible can be used to support the conclusions of the court. *Braewood Convalescent Hospital v. WCAB* (1983) 34 Cal. 3d 159, *Garza v. WCAB* (1970) 34 Cal. 3d 312, *Bassett McGregor v. WCAB* (1988) 205 Cal.App. 3d 1102.

As set forth by the applicant in his answer to defendant's petition on page 7 lines 13 through page 9 line 7, the court did meet the test as set forth in *McCallister v. WCAB* (1968) 69 Cal. 2d 408, the record as a whole shows the applicant's exposure to pulmonary irritants and that exposure based on Dr. Hirsh's report accelerated and or caused the applicant's death from IPF.

Therefore, this court request the Board uphold its Opinion on Decision and Findings, Award and Order finding that Mr. Romero's death was related to his industrial exposure to pulmonary irritants over his 37-year career with Clorox.

IV

CONCLUSION

Therefore, this court requests the Board deny defendant's Petition for Reconsideration and uphold the findings and orders the applicant's death was related to his employment.

DATE: 10/9/20

Alan Skelly

WORKERS' COMPENSATION JUDGE