WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JONATHAN TORRES, *Applicant*

vs.

COUNTY OF LOS ANGELES SHERIFF'S DEPARTMENT, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ11869760
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, issued by the workers' compensation administrative law judge (WCJ) on September 8, 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 colon cancer.

Defendant contends that it rebutted the Labor Code section 3212.1 presumption and applicant did not sustain an injury AOE/COE, and that proceeding to trial via telephone was a denial of its due process rights.

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, for the reasons stated by the WCJ in the Report, and for the reasons discussed below, we will affirm the Findings.

BACKGROUND

Applicant claimed injury in the form of colon cancer while employed by defendant as a deputy sheriff during the period from October 29, 2015 through October 25, 2018.

On May 22, 2019, applicant was evaluated by internal medicine agreed medical examiner (AME) Jeffrey A. Hirsch, M.D. Dr. Hirsch examined applicant, took a history, reviewed the

medical record, and researched the issue of the cause of colorectal cancer. He diagnosed multi-factorial toxic exposure and "Adenocarcinoma of the colon; widely metastatic to liver and lungs." (Joint Exh. 3, Dr. Hirsch, June 19, 2019, p. 8.) In his report Dr. Hirsch discussed medical literature as to the cause of colon cancer and he stated:

> Since the genetic testing at City of Hopi was negative for a heritable mutation causing colon cancer, it is more probable that environmental exposures played some impact. Furthermore, since cancer is a multi-step process requiring a series of mutations between normal cells and the eventual presence of malignant cells capable of causing disease, it is speculative to assume that Mr. Torres would have completed that series of mutations absent the industrial exposures. ¶ In further considering these observations, it is my opinion that the non-attribution clause has been rebutted by the fact pattern in this case. If apportionment is allowable in cases of this nature, 40% of the permanent disability caused by colon cancer is industrial and 60% is non-industrial.
> (Joint Exh. 3, p. 12.)

Dr. Hirsch's deposition was taken on September 18, 2019. (Joint Exh. 6, Dr. Hirsch, September 18, 2019, deposition transcript.) His testimony relevant to the issues herein included:

> Q. …I mean he came to the county of Los Angeles ridded with cancer. Do you agree with that? …
> A. It approaches medical certitude that Mr. Torres did not have any type of colon cancer Stage I, II, III, or IV. He did not have that when he became a sworn peace officer. As I testified a moment ago the natural history of this type of colon cancer is pretty rapid moving. So if he had colon cancer when he became a peace officer he would have died by 2018 absent treatment.
> (Joint Exh. 6, pp. 13 – 14.)

> Q. Okay. Would you agree that latency periods can vary?
> A. Tremendously.
> Q. Opinions by doctors vary as well with regard to latency periods; correct?
> A. Even more tremendously.
> Q. Okay. So would you agree that the latency can vary tremendously depending on the particular cancer causing substance and the specific cancer it produces?
> A. And the individual. The - - the unique characteristics of the individual, Yes, I agree with that.
> (Joint Exh. 6, p. 41.)
> Q. … Doctor, you do believe that there are exposures in his employment that caused his colon cancer?
> A. That are reasonably linked. … Yes, I believe that there are exposures in his employment that are reasonably linked with colon cancer, yes.
> (Joint Exh. 6, pp. 44 – 45.)

> Q. But, Doctor, do you still believe that … the presumption has been rebutted by the shortened period of latency which is defined by the exposure to the carcinogen in the evolution of cancer?
> A. That's the problem, Ms. Montgomery, is that because cancer happens after a series of mutations I see no evidence that allows me to rebut the presumption because the last several mutations probably occurred while he was working as a deputy while he was breathing carcinogens.
> (Joint Exh. 6, p. 45.)

> A. That's correct. The idea of an eight to ten year latency period with a general conception that oncologists and people who are involved in understanding research and caring for cancer use. It's not a fixed concept and I don't believe one would find any information in in reliable studies about latency as it relates to colon cancer. Specifically colon cancer.
> (Joint Exh. 6, p. 46.)

Dr. Hirsch submitted a supplemental report on November 26, 2019. His further research into the issue of latency did not change his opinions as previously stated. (Joint Exh. 2, Dr. Hirsch, November 26, 2019.)

Dr. Hirsch's deposition was taken again on July 31, 2020. (Joint Exh. 5, Dr. Hirsch, January 31, 2020, deposition transcript.) His testimony included:

> A. … It approaches medical certitude that if Mr. Torres had rectal bleeding from colon cancer in October 2015 he would be dead. He would have been dead by October 2018. The natural history of untreated colon cancer as you see with what was happening in Mr. Torres before he got treatment is a fairly brisk march over the course of months to death. So I don't think it's at all probable that he had rectal bleeding for three years. I think it's much more possible that he had rectal bleeding throughout 2018 as we kind of concluded earlier in handling this case.
> (Joint Exh. 5, p. 13.)

Dr. Hirsch was deposed again on April 6, 2020. (Joint Exh. 4, Dr. Hirsch, April 6, 2020, deposition transcript.) The testimony included:

> Q. And I think you testified and I don't want to put words in your mouth, but I will ask you again. You feel that the exposure to carcinogens in Mr. Torres' case had a synergistic effect with those mutations?
> A. Yes. It is plausible and there is no way to show that through research or experimentation or a blood test or any type of direct information from Mr. Torres, but looking at the way that that cancer occurs because of a series of usually approximately ten mutations, then looking at the sequence of Mr. Torres' career it is highly plausible that his carcinogenic exposures in his job contributed to that chain of mutations. (Joint Exh. 4, p. 11.)

On May 8, 2020, Dr. Hirsch submitted a supplemental report. After reviewing applicant's deposition testimony, additional medical records, and cancer research papers, his opinions regarding the cause of applicant's colon cancer, as previously stated, had not changed. (Joint Exh. 1, Dr. Hirsch, May 8, 2020.)

The parties proceeded to trial on June 8, 2020. (Minutes of Hearing and Summary of Evidence (MOH/SOE), June 8, 2020.) The matter was continued to July 9, 2020. (MOH/SOE, July 9, 2020.) The issue submitted for decision was injury AOE/COE. (MOH/SOE, June 8, 2020, p. 2.)

DISCUSSION

Labor Code section 3212.1 states in part:

> (a) This section applies to all of the following: …
>
> (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. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption. …
> (Lab. Code, § 3212.1)

It is well established that the burden of proof rests upon the party holding the affirmative of the issue. (Lab. Code, § 5705; *Lantz v. Workers' Comp. Appeals Bd*. (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (*Obernier*) (1995) 34 Cal.App.4th 1204, 1212-1213 [60 Cal.Comp.Cases 289, 291-292].) It appears defendant does not dispute the fact that the Labor Code section 3212.1 cancer presumption applies to applicant's colon cancer injury claim. Defendant argues that it rebutted the presumption

because there is no reasonable link between the carcinogens to which applicant was exposed and the colon cancer that he developed. To rebut the presumption, a defendant must submit evidence that explicitly demonstrates that medical or scientific research has shown there is no reasonable inference that exposure to the specific known carcinogen or carcinogens is related to or causes the development of the cancer. (*Faust v. City of San Diego* (2003) 68 Cal.Comp.Cases 1822, 1832 (appeals Board en banc).)

In regard to section 3212.1, the Second District Court of Appeals stated:

> We hold that the statute means exactly what it says: to rebut the presumption, the employer must prove the absence of a reasonable link between the cancer and the industrial exposure to the carcinogen. A mere showing of an absence of medical evidence that the carcinogen has been shown to cause the particular cancer contracted by the employee is not sufficient to rebut the presumption. … Because the Agreed Medical Examiner's (AME) opinion that Garcia's cancer was not occupationally related was based upon the absence of a known cause for kidney cancer and the absence of medical studies showing a link between kidney cancer and benzene, the City failed to rebut the statutory presumption.
> (*City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 305 - 306 [70 Cal. Comp. Cases 109].)

The Court later explained:

> If there was any doubt, the 1999 amendments and the legislative history of those amendments dispels it. The amendments removed the requirement that the employee prove a 'reasonable link' and shifted the burden of proof to the employer to *disprove* a reasonable link, and to establish the primary site of the cancer. … The inescapable conclusion is that the Legislature intended to remove the burden from employees and enable them to obtain benefits even when it was not possible to prove the cancer was linked to the particular carcinogen. ¶ … An employer does not meet its burden merely by showing that no studies exist showing a positive link between the exposure and the particular form of cancer. That no studies exist - perhaps because they have not been undertaken or completed, or because their results were inconclusive - does not prove or disprove anything. The absence of medical evidence linking a known carcinogen with a particular form of cancer simply represents a void of information, and cannot be considered proof a reasonable link does not exist.
> (*Id*, at pp. 315 – 316, citations omitted.)

Review of the trial record is clear; defendant submitted no evidence that medical or scientific research has shown that there is no reasonable inference that applicant's exposure to the specific known carcinogens is related to or causes the development of the cancer. (*Faust v. City of San Diego, supra.*)

Defendant also argues that the presumption has been rebutted because the latency period for colon cancer is longer than applicant's employment as a deputy sheriff with defendant. The Appeals Board has previously concluded that to successfully rebut the cancer presumption defendants are required to introduce medical/scientific evidence explicitly demonstrating that there are no circumstances under which applicant could develop cancer in a period of time that is less than the latency period. (*City of Pittsburg v. Workers' Comp. Appeals Bd. (Ligouri)* (2018 W/D) 83 Cal.Comp.Cases 711.) In our *Ligouri* decision we noted that latency periods can vary from case to case, and that the doctor in that matter, could not rule out the possibility of a shorter latency period. (*Ligouri, supra*, at p. 713.) Here, Dr. Hirsch did not, and could not, rule out the possibility that applicant's cancer had a shorter latency period.

Finally, regarding defendant's argument that the trial conducted via telephone was a denial of due process, we first note that defendant participated in the trial, including taking applicant's testimony, and was in possession of the Joint Exhibits submitted into evidence. Also, although defendant argues that proceeding with the hearing denied the WCJ the opportunity to "assess" applicant's credibility (Petition, p. 7), the WCJ's Findings were based on the reports and deposition testimony of AME Dr. Hirsch, not applicant's testimony. (See Opinion on Decision.) It appears that applicant's testimony was consistent with the history he gave Dr. Hirsch as well as the reports in the medical records reviewed by Dr. Hirsch. Defendant did not identify any discrepancies or inconsistencies regarding applicant's trial testimony and the exhibits submitted into the record. Nor did defendant explain how it was harmed in anyway by the alleged denial of due process. We agree that a fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal. Comp. Cases 584]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805.) But as discussed herein, defendant was not denied any of its due process rights.

Accordingly, we affirm the Findings.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 8, 2020 Findings is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 7, 2021

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

JONATHAN TORRES
LEWIS MARENSTEIN WICKE SHERWIN & LEE LLP
ZGRABLICH & MONTGOMERY

TLH/*pc*

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