WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ANGELA DAWSON, A*pplicant*

vs.

PATTON STATE HOSPITAL;
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ13344359
Santa Barbara District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration of the February 15, 2022, Findings and Order to further study the factual and legal issues. This is our decision after reconsideration.

Applicant seeks reconsideration of the February 15, 2022, Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant did not sustain an injury arising out of and in the course of her employment to her psyche and internal systems as a result of a COVID-19 infection.

Applicant contends that the WCJ erred in finding that she did not sustain an industrial injury because applicant met her burden of showing a reasonable probability that she contracted COVID 19 at work. Applicant also contends that the WCJ's decision is not supported by substantial medical evidence and that the WCJ has a duty to develop the record.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that the petition be denied. For the reasons discussed below, as our decision after reconsideration we will rescind the February 15, 2022, Findings and Order and return this matter to the trial level for further proceedings and a new decision.

FACTS

Applicant was employed by the Department of State Hospitals as a dietician at Patton State Hospital in San Bernadino in early 2020. (December 21, 2021, Minutes of Hearing and Summary of Evidence (MOH/SOE), p. 2.)

Applicant returned to work from a vacation in New Orleans on March 4, 2020, and attended a union meeting that same day. (MOH/SOE, p. 7.) On March 5, 2020, applicant was seen by an urgent care doctor. She complained of a sore throat and was diagnosed with "either laryngitis or pharyngitis." (MOH/SOE, p. 6.) She testified that she did not have any symptoms on March 5, 2020, other than a "raw" sore throat. (*Ibid*.) Applicant then traveled to Oakland and Sacramento to participate in union activities from March 9 through March 14. Applicant worked a full day in the office on March 16, 2020, and showed up to her workplace on March 17, 2020. However, on March 17, applicant was noted to have a raspy voice while answering COVID-19 screening questions and was sent home. (MOH/SOE, p. 7.) On March 23, 2020, applicant scheduled a COVID-19 test. (*Id*. at p. 8.) According to the Minutes of Hearing and Summary of Evidence, in response to questions posed by the WCJ, applicant testified that she began to experience additional symptoms beyond a sore throat on March 23, 2020, and on March 24, 2020, she experienced symptoms including "headaches, body aches, difficulty breathing, loss of sense of smell and taste, and more sever[e] fatigue." (*Id*. at p. 10.) On March 28, 2020, Applicant tested positive for COVID 19 based on a sample taken on March 27, 2020. (Exh. M.)

Applicant's primary treating physician, Nachman Brautbar, M.D. and the panel qualified medical evaluator, Mark Hyman, M.D. disagreed on whether it was probable that applicant contracted COVID-19 at work.

Dr. Hyman produced multiple reports and was deposed on June 8, 2021. He performed a panel qualified medical evaluator re-evaluation and issued a comprehensive report on July 22, 2021. Dr. Hyman opined that "[I]t is most medically probable that Ms. Dawson obtained her infection while traveling in New Orleans. That would fit with the multiple times there were notations of a sore throat of at least two weeks duration." (Exh. B, July 22, 2021, Mark Hyman, M.D., Comprehensive Panel Qualified Medical Re-evaluation, p. 5.)

Dr. Brautbar disagreed with Dr. Hyman's reasoning. He wrote:

> We have to go and look at when she started to develop her symptoms. According to Dr. Hyman's report, because the patient had a sore throat, he speculates that this was due to COVID-19…Symptoms may appear 2-14 days after exposure to the virus. If you use 3/28/2020 as the date she has a positive COVID-19 test, then it did rule out the trip to New Orleans because it is just too long of a latency period. It would fit for the latency period of the patient's trip to California for union work.
> (11/24/21 report, p.12.)

In his Report, the WCJ explained that he found Dr. Brautbar's reporting was not substantial medical evidence on the issue of industrial causation because:

> Most significantly, Dr. Brautbar indicated that COVID-19 symptoms typically appear 2-14 days after exposure (Applicant's Exhibit 1, pg. 12) and the average period for symptoms to appear after exposure is 5 days (Applicant's Exhibit 10, pg. 4.) Dr. Brautbar identified two potential transmission points: (1) during Applicant's New Orleans vacation from February 21, 2020, through March 3, 2020; and (2) during the union-related activities throughout California, which occurred from March 6, 2020 through March 13, 2020. Utilizing the March 28, 2020, marker, Dr. Brautbar effectively rules out the New Orleans vacation as the source of transmission of COVID-19 as an incubation/latency period of 28 to 35 days would be inconsistent with the history of this infection. Dr. Brautbar than summarily concludes that transmission of COVID-19 must have occurred during Applicant's travel throughout California for union-related activities. The undersigned found this conclusion to be entirely speculative and unsupported by Dr. Brautbar's own reasoning and parameters. Applying Dr. Brautbar's 2-14 incubation latency standard from the March 28, 2020, marker, the Applicant was not traveling for union related activities between March 14, 2020 and March 26, 2020. Even if the Applicant was one of those outliers wherein in took the full 14 days to develop symptoms, this would still be outside the timeframe of the union-related activities.
> (Report, p 7.)

The WCJ also found applicant's trial testimony that she developed a full array of symptoms around March 23 or 24 to not be credible and noted that it was "in conflict with the medical evidence." (Report, p. 7.)

After the December 21, 2021, trial, the WCJ issued the February 15, 2022, decision that is the subject of applicant's Petition for Reconsideration.

ANALYSIS

The test for whether an injury arose out of and in the course of employment is well-established. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].)

First, the injury must occur "in the course of employment," which ordinarily "refers to the time, place, and circumstances under which the injury occurs." (*LaTourette, supra,* 63 Cal.Comp.Cases at p. 256.) An employee is acting within "the course of employment" when "he does those reasonable things which his contract with his employment expressly or impliedly permit him to do." (*Ibid*.) An employee necessarily acts within the "course of employment" when "performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied." (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729 [48 Cal.Comp.Cases 326, 328].)

Second, the injury must "arise out of" the employment, "that is, occur by reason of a condition or incident of employment." *(Employers Mutual Liability Ins. Co. of Wisconsin v. I.A.C. (Gideon)* (1953) 41 Cal.2d 676 [18 Cal.Comp.Cases 286, 288]. "[T]he employment and the injury must be linked in some causal fashion," but such connection need not be the sole cause, it is sufficient if it is a "contributory cause." (*Maher, supra,* 48 Cal.Comp.Cases at page 329.)

A finding that an injury is an industrial injury must be based on substantial medical evidence. To be substantial evidence, expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and an examination, and set forth reasoning to support the expert conclusions reached. (*E.L. Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) "A medical report predicated upon an incorrect legal theory and devoid of relevant factual basis, as well as a medical opinion extended beyond the range of the physician's expertise, cannot rise to a higher level than its own inadequate premises." (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358, 363].) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture, or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.*, (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases at 93, 97] Whether a physician's opinion constitutes substantial

evidence "must be determined by the material facts upon which his opinion was based and by the reasons given for his opinion." (*Ibid.*)

Substantial evidence of industrial causation must be based on reasonable medical probability--it is not required to prove causation to a "scientific certainty." (See *McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal. 2d 408, [33 Cal.Comp.Cases 660]; *Rosas* v. *Workers' Compensation Appeals Board* (1993) 16 Cal.App.4th 1692 [58 Cal.Comp.Cases 313, 319].)

In cases where an applicant's injury is caused by a communicable disease, the essential questions of when and where applicant contracted the disease may be unanswerable with any certainty. In those circumstances, the employee can establish industrial causation by demonstrating that it is more likely applicant acquired the disease at work or that the employment subjected the employee to a special risk of exposure in excess of the general population. (*Bethlehem Steel Co. v. Industrial Acc. Com*. (1943) 21 Cal.2d 742 [8 Cal.Comp.Cases 61].) For example, the Appeals Board found that a detective's Hepatitis B infection arose out of and in the course of employment because the nature of his work exposed him to drug addicts and needles and those exposures resulted in a higher probability of contracting Hepatitis B than the general population. (*City of Fresno v. Workers' Comp. Appeals Bd. (Bradley)* (1992) 57 Cal.Comp.Cases 375 (writ den.).) In a similar case, a Hepatitis C infection contracted by a sewage worker was found industrial based on medical reporting that it was "more probable than not" that applicant contracted the virus at work. (*City of Turlock v. Workers' Comp Appeals Bd.* (STK09YYZZZ) (2007) 72 Cal.Comp.Cases 931, 934 (writ den.).)

Reasonable probability does not require applicant to prove in detail, "…the approximate number of hours of exposure, or as to the amount of exposure needed to increase materially the danger of injury." (*McAllister, supra,* 69 Cal.2d at 418 referring to *Industrial Indem. Exchange v. Industrial Acc. Com.* (1948) 87 Cal.App.2d 465 [13 Cal.Comp.Cases 220].) Nor does an employee have to prove "scientifically…the source of contagion or the cause of the disease, but only that he establish by a preponderance of likelihood the fact that his disability arose out of and happened in the course of employment." (*McAllister, supra,* 69 Cal.2d at 417-418.) It is a medical expert's job

to assess whether is medically probable that disease transmission occurred at work. The opinions of qualified physicians are entitled to consideration "since it is part of their vocation to observe diseases and how they spread and to draw conclusions from those observations." (*Pacific Employers Ins. Co. v. Industrial Acc. Com. (Ehrhardt)* (1942) 19 Cal.2d 622, 629, quoting *San Francisco v. Industrial Acc. Com. (Slattery)* (1920) 183 Cal. 273, 284.)

As a result of the problems of proof presented by a global pandemic where the methods of disease transmission were initially poorly understood, the governor issued a series of emergency orders, including an order to "stay at home" on March 19, 2020. (EO-N-32-20.) On May 6, 2020, the governor ordered that COVID-19 contracted after the March 19, 2020 "stay at home" Executive Order be presumed to be work related if certain conditions were met. (EO-N-62-20.) The conditions included that the employee perform work for an employer on or after March 19, 2020, at the employer's place of business. In this case, the EO-N-62-20 presumption does not apply because applicant was last at work on March 17, 2020. Given that there is no presumption, the WCJ must determine, based on substantial medical evidence, whether it is reasonably probable that applicant acquired COVID-19 as a result of a workplace exposure. (*McAllister, supra,* 69 Cal.2d at 418.)

In reviewing the medical records in this case, we note that much consideration was given to the latency period between exposure to COVID-19 and the development of symptoms. Applicant had a sore throat at the beginning of March and eventually developed more severe symptoms. Determining whether applicant had Covid on a particular date requires medical expertise and applicant's primary treating physician (PTP) and the panel qualified medical evaluator (PQME) differ in their assessment of whether applicant's sore throat was the first sign of COVID-19 or her sore throat can be attributed to some other cause. The WCJ used the date of applicant's positive COVID-19 test and concluded that, because applicant did not engage in any union activities in the 14 days prior to that test, that Dr. Brautbar's reasoning was flawed. (Report, p. 7.) However, applicant did work her regular job on March 16, 2020, and reported to work on March 17, 2020. Both dates are within 14 days of the positive COVID-19 test on March 27, 2020.

More importantly, both the PQME and the PTP based their opinions on when applicant was most likely exposed to the virus on applicant's symptoms—not the date of the positive test. Neither medical expert analyzed the latency period in the same manner the WCJ did. It is well established that, with respect to matters requiring scientific medical knowledge, the WCJ cannot disregard a medical expert's conclusion when the conclusion is based on expertise in evaluating the significance of medical facts. (*Gatten, supra*.) Therefore, the WCJ's finding that applicant did not sustain an injury arising out of and in the course of employment is not based on substantial medical evidence.

The Appeals Board has authority to develop the record when the medical record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie, supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Id.*)

Here, the medical record requires further development in light of applicant's trial testimony about the timing of the development of more severe symptoms. Each doctor should provide an expert medical opinion on when applicant developed a COVID-19 infection. After establishing a probable date, the evaluating physicians should then provide an expert medical opinion on the probability that the applicant was exposed to the virus that caused the infection at work.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration that the February 15, 2022 Findings and Order is **RESCINDED,** and the matter is **RETURNED** to the trial level for further proceedings and a new decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 10, 2023

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

ANGELA DAWSON
GLAUBER BERENSON VEGO
STATE COMPENSATION INSURANCE FUND

MWH/mc

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