WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

STUART SWAN (Deceased), ***Applicant***

vs.

MORENO VALLEY UNIFIED SCHOOL DISTRICT, permissibly self-insured, administered by KEENAN & ASSOCIATES; MORENO VALLEY DODGE and HONDA /MOSS BROS DODGE and CHUBB administered by ESIS RISK MANAGEMENT SERVICES; INSURANCE COMPANY OF THE WEST, ***Defendants***

Adjudication Numbers: ADJ9936596, ADJ10421429
Riverside District Office

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

Defendant Moreno Valley Unified School District (Moreno Valley Unified) seeks reconsideration of the Joint Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on May 18, 2022, wherein the WCJ found in pertinent part that the reports of Mark M. Ngo, M.D., are not substantial evidence to support the January 12, 2021 Amended Petition for Reimbursement, and that further development of the record was not necessary; the WCJ ordered that Moreno Valley Unified take nothing by way of its January 12, 2021 Amended Petition for Reimbursement.

Moreno Valley Unified contends that because "Dr. Ngo's attribution of apportionment being relatively minor cannot be construed as no apportionment at all," it is entitled to further develop the record regarding "the extent of exposure" by Moss Bros Dodge. (Petition for Reconsideration (Petition), p. 4.)

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received a Joint Answer (Answer) from defendant Moreno Valley Dodge and Honda/Moss Bros Dodge – Chubb/ESIS (Moss Bros Dodge).

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, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Stuart Swan claimed injury in the form of cancer as a result of exposure to chemicals while employed as an irrigation specialist by Moreno Valley Unified during the period from February 7, 2000, through May 23, 2014 (ADJ9936596).

Hematology/Oncology qualified medical examiner (QME) Mark M. Ngo, M.D., initially evaluated Mr. Swan on December 30, 2015. Regarding the cause of Mr. Swan's cancer, Dr. Ngo stated:

> [T]he claimant's multiple myeloma is relevant and pertinent for analysis to determine apportionment in this case. I apportion 90% to industrial causation due to his above-noted chemical exposures. I apportion 10% to nonindustrial causation from his obesity as this is a manageable pre-existing medical condition associated with the development of multiple myeloma. ¶ With regard to apportionment to prior employment, I apportion 40% to the Moreno Valley Unified School District due to his 15-year employment and exposure to pesticides and glyphosate. I apportion 60% to his prior employment as his job duties included painting at Moreno Valley Honda & Dodge and exposure to pesticides from gardening and pesticide spraying from his contract employment as a gardener.
> (Def. Exh. F, Dr. Ngo, December 30, 2015, p. 18.)

On May 19, 2016, Moreno Valley Unified filed an Application for Adjudication of Claim (Application) whereby it claimed that Stuart Swan sustained injury in the form of cancer as a result of exposure to chemicals while employed by Moss Bros Dodge, during the period from January 1, 1999, through January 31, 2000 (ADJ10421429).[1]

Dr. Ngo re-evaluated Mr. Swan on April 14, 2017. The diagnoses included multiple myeloma and squamous cell carcinoma (skin cancer). As to apportionment, Dr. Ngo stated:

> For the claimant's squamous cell and basal cell skin cancers, I apportion 90% to industrial causation and 10% to non-industrial causation from previous recreational sun exposure outside of work. The apportionment for the claimant's skin cancer should also take into account a history of sun exposure from prior employment. His job duties at Moreno Valley Honda & Dodge did not result in significant sun exposure. He worked for 15 years for the Moreno Valley Unified School District and for 10 years in various capacities as an independent contractor for landscapers. So, taking into account the duration of his current

[1] At the May 5, 2022 trial the parties stipulated that the workers' compensation carriers for Moss Bros Dodge were CHUBB, administered by ESIS from January 31, 1999, through August 1, 1999, and Insurance Company of the West from August 1, 1999, through January 31, 2000. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 5, 2022, p. 2.)

> and prior employment, I apportion 60% to the Moreno Valley Unified School District and 40% to prior employment as an independent contractor and landscaper. ¶ My apportionment regarding the claimant's multiple myeloma remains unchanged from my initial evaluation.
> (Def. Exh. D, Dr. Ngo, April 14, 2017, p. 13.)

Mr. Swan passed away on June 14, 2018. Both injury claims were resolved by a Dependency claim Compromise and Release; a WCJ issued the Order Approving Compromise and Release on April 24, 2019. On May 13, 2019, Moreno Valley Unified filed a Petition for Reimbursement and on January 12, 2021, it filed an Amended Petition for Reimbursement.

Hematology/Oncology QME James A. Padova, M.D., was provided "approximately 2855 pages" of medical records and was asked to submit a report addressing the issue of whether Mr. Swan sustained a work related injury and the issue of apportionment. (Def. Exh. B, Dr. Padova, May 5, 2021, p. 1.) In his December 15, 2021 supplemental report Dr. Padova concluded that Mr. Swan's work for Moss Bros Dodge was not a contributing cause of Mr. Swan's cancer. The doctor explained the basis his opinion regarding causation as follows:

> [T]he maximum exposure to painting chemicals while working at Moreno Valley Dodge would have been about 7- 8 weeks per year. Although it is known that certain paint and paint-related substances contain chemical carcinogens such as benzene and other carcinogens known to be linked to the causation of hematologic malignancies such as lymphoma, leukemia and multiple myeloma, studies in full-time workers in the paint industry did not show significant increase in cases of multiple myeloma with less than five years of paint exposure. Therefore, in Mr. Swan's case, since clearly he did not have five years of likely paint carcinogen exposures while working with Moreno Valley Dodge, I do not believe his employment with Moreno Valley Dodge had a causative connection to his later diagnosis of multiple myeloma.
> (Def. Exh. A, Dr. Padova, December 15, 2021, p. 2.)

QME Dr. Ngo was provided additional medical records and counsel for Moreno Valley Unified requested that he submit a supplemental report addressing apportionment. In his April 4, 2022 supplemental report Dr. Ngo stated:

> With regard to your request to address my opinion regarding apportionment to prior employment for his multiple myeloma, my initial apportionment of 60% to prior employment included a combination of his work painting at Moreno Valley Honda & Dodge and exposure to pesticides from contract employment as a gardener. I did not further apportion individually to each prior employer. Although the total time he spent painting at Moreno Valley Honda & Dodge was limited, I still considered his exposure from painting as a minor causative factor.

> Furthermore, I do feel that his exposure to pesticides working as a gardener for various companies over 10 years was much more significant and similar to the types of exposures he suffered while working for the Moreno Valley Unified School District. So, I heavily weighted this prior exposure as a gardener before he worked at the Moreno Valley Unified School District when determining apportionment and I continue to maintain my initial opinion of 60% apportionment to prior employment and 40% to the Moreno Valley Unified School District. If so requested, I can issue an opinion regarding apportionment specifically to Moreno Valley Honda & Dodge, however, I acknowledge as stated above that any apportionment to that employer would be relatively minor. ¶ Regarding his skin cancers, I considered that he had more sun exposure while working for the Moreno Valley Unified School District compared to prior employment when determining apportionment in my re-evaluation report. Therefore, my opinion on apportionment for his skin cancers remains unchanged from my prior reports since there is no additional medical information that would alter my opinion.
> (Def. Exh. I, Dr. Ngo, April 4, 2022, p. 6.)

Defendants proceeded to trial on May 5, 2022. For both injury claims, the issues submitted for decision were Moreno Valley Unified's motion for "further development of the record as it would pertain to the reporting of Dr. Mark Ngo" and the January 12, 2021 Amended Petition for Reimbursement. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 5, 2022, pp. 2 – 3.)[2]

DISCUSSION

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue. (Lab. Code, §5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) However, if a party fails to meet its burden of proof by obtaining and introducing competent evidence, it is not the job of the Appeals Board to rescue that party by ordering the record to be developed. (Lab. Code, § 5502; *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Telles Transport Inc. v. Workers' Comp. Appeals Bd*. (2001) 92

[2] The parties had previously agreed that Dr. Ngo could issue a supplemental report (Def. Exh. I) that would be admitted into evidence. (See Minutes of Hearing, March 30, 2022.)

Cal.App.4th 1159 [66 Cal.Comp.Cases 1290]; *Guzman v. Workers' Comp. Appeals Bd*. (2013 W/D) 78 Cal.Comp.Cases 893.)

Here, as stated by the WCJ in the Report:

> Dr. Ngo's supplemental report of 4/4/2022 was taken into evidence (Defendant's Exhibit "I"). Given the fact that defendant MVUSD had been given the opportunity to obtain that supplemental report and it had been taken into evidence, the court is persuaded that further development of the record is not needed.
> (Report, p. 4.)

Further, as noted above, the Application claiming that Stuart Swan sustained injury in the form of cancer as a result of his employment by Moss Bros Dodge, was filed on May 19, 2016. Dr. Ngo re-examined Mr. Swan on April 14, 2017, and his deposition was taken on January 12, 2018. (See Def. Exh. G, Dr. Ngo, January 12, 2018, deposition transcript.) Moreno Valley Unified filed its Amended Petition for Reimbursement on January 12, 2021. Based on our review of the trial record and the Electronic Adjudication Management System (EAMS) ADJ file, it appears that Moreno Valley Unified conducted no discovery after Dr. Ngo's January 12, 2018 deposition. Based thereon, it is clear that Moreno Valley Unified had ample time to complete discovery that would have supported its claim against defendants Moss Bros Dodge and Chubb/Insurance Company of the West for reimbursement, but it chose not to do so. Otherwise stated, Moreno Valley Unified failed to exercise due diligence in prosecuting its claim and it has not shown good cause for further development of the record.

Finally, in his December 15, 2021 report, quoted above, Dr. Padova explained in detail why he concluded that Mr. Swan's "employment with Moreno Valley Dodge had a causative connection to his later diagnosis of multiple myeloma." (Def. Exh. A, p. 2.) Dr. Padova's reports constitute substantial evidence and are consistent with the WCJ's Order that Moreno Valley Unified take nothing by way of its January 12, 2021 Amended Petition for Reimbursement.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Joint Findings and Order issued by the WCJ on May 18, 2020, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 5, 2022

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

4600 GROUP
GREENUP, HARTSTON& ROSENFELD
MICHAEL SULLIVAN & ASSOCIATES
TOBIN LUCKS LLP

TLH/*pc*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Defendant, Moreno Valley Unified School District, permissibly self-insured as administered by Keenan and Associates, by and through their attorneys of record, has filed a timely and verified Petition for Reconsideration challenging the Findings and Order issued by the undersigned Judge on 5/18/2022.

Petitioner seeks reconsideration on the following grounds:

1. The evidence does not justify the findings of fact;
2. The findings of fact do not support the Order, Decision, or Award, and;
3. By such Order, Decision or Award, the Workers' Compensation Administrative Law Judge acted without or in excess of his powers.

II

CONTENTIONS:

Petitioner's basic contention is that the WCALJ has the duty to develop the record, and to take steps necessary to establish the medical opinion of PQME Dr. Ngo in relation to petitioner's Petition for Reimbursement as against the other defendants.

The co-defendant's response (ICW Group) was received 6/15/2022 (EAMS Doc ID 41894938), and contends that it was not error for the WCJ to proceed to Trial and submit the case for decision on the current record, with further development of the record to obtain additional opinion and reporting from Dr. Ngo, and that it was not appropriate for the petitioning defendant at the time of Trial to assert that additional discovery needed to be completed.

III

FACTS

Stuart Swan, age 53 at the time of the second injury as set forth below, claimed to have sustained injury in the form of cancer, skin, other body systems, and neurology, as follows:

ADJ10421429 (MF)-While employed by Moreno Valley Dodge during the period 1/1/1999 through 1/31/2000, whose workers' compensation carriers were

Chubb as administered by ESIS (1/31/1999 through 8/1/1999) and Insurance Company of the West (8/1/1999-1/31/2000.)

ADJ9936596-While employed by the Moreno Valley Unified School District during the period 2/7/2000 through 5/24/2014, who was permissibly self-insured and as administered by Keenan & Associates.

The parties proceeded to Trial on 5/5/2022 (appearing by AT&T Teleconference by Order of 5/2/2022), at which time the case stood submitted on the issues as outlined below.

IV

DISCUSSION:

In proceeding to Trial, the court considered several issues:

ADMISSION OF EXHIBITS:

Each side had objected to the admission of the medical reporting of defense QME Dr. James Padova and PQME Dr. Mark Ngo on the basis that such reporting did not represent substantial medical evidence. However, after the court's review, said objections dealt with the weight of evidence to be given to each report rather than their underlying admissibility, and thus Defense Exhibits "A", B", "D", "E", "F", "G", and "I" were admitted into evidence.

MOTION FOR FURTHER DEVELOPMENT OF THE RECORD:

Defendant Moreno Valley Unified School District, permissibly self-insured and administered by Keenan & Associates ("MVUSD"), moved for further development of the record. The contention was that the PQME in their case Dr. Ngo had provided a supplemental report of 4/4/2022 (Defendant's Exhibit "I") had not addressed the issues presented in their request following the Mandatory Settlement Conference (to be discussed further below).

The court notes the Mandatory Settlement Conference (MSC) conducted by Judge Yee 1/12/2022 (see Minutes of Hearing 1/12/2022), proceeded by the Declaration of Readiness to Proceed filed on behalf of defendant MVUSD dated 12/10/2021 (EAMS Doc ID 39339585), which includes a declaration inter alia that "WCAB assistance needed to obtain Order for contribution/ reimbursement". This was followed by an objection on behalf of defendant Chubb/ESIS ("Chubb"). The MSC set 1/12/2022 was taken off calendar for further discovery, but restored upon the filing of the Declaration of Readiness to Proceed dated 1/26/2022 filed on behalf of defendant Chubb (EAMS Doc ID 39894652) to which an objection was filed on behalf of MVUSD on 2/28/2022 (EAMD Doc ID 40308280) that a report of Dr. Padova of 12/13/2021 had not

been served. At the MSC of 3/30/2022 (see Minutes of Hearing 3/30/2022) Judge Yee set the matter for Trial, leaving discovery open for "parties allow Dr. Ngo to issue a supplemental report", and further "Trial judge has discretion if matter needs to be developed."

Dr. Ngo's supplemental report of 4/4/2022 was taken into evidence (Defendant's Exhibit "I"). Given the fact that defendant MVUSD had been given the opportunity to obtain that supplemental report and it had been taken into evidence, the court is persuaded that further development of the record is not needed. In other words, the petitioner had been given time between the MSC of 3/30/2022 (or for that matter the earlier MSC of 1/12/2022, at which latter time discovery was left open) to the Trial of 5/5/2022 to obtain the additional report of PQME Dr. Ngo, which as discussed below his report of 4/4/2022 not representing substantial evidence upon which an award of reimbursement could be made.

PETITION FOR REIMBURSEMENT DATED AS AMENDED 1/12/2021:

The primary issue presented was the Petition for Reimbursement as filed by defendant Moreno Valley Unified School District, permissibly self-insured as by Keenan and Associates in ADJ9936596, as against defendant Moreno Valley Dodge, as insured by Insurance Company of the West and Chubb as administered by ESIS in ADJ10421429. Said Petition (as amended) appears in the record as dated 1/12/2021.

As to case number ADJ9936596, injury was alleged from 2/7/2000 to 5/23/2014 in the form of cancer for exposure as the result of exposure as against Moreno Valley Unified School District ("MVUSD"). In connection with that case, the applicant was evaluated by the panel qualified medical examiner (PQME) Dr. Ngo (Defendant's Exhibits "D", "E", "F", "G" and "I").

On 5/19/2016, the above defendant filed an Application for Adjudication of Claim as against Moreno Valley Dodge as to case number ADJ10421429, alleging injury of 1/1/1999 through 1/31/2000, for which coverage was provided by the Insurance Company of the West ("ICW") and Chubb as administered by ESIS ("Chubb"). In connection with that case, reporting was provided by defense QME Dr. James Padova (Defense Exhibits "A" and "B").

On 3/27/2018, and Order of Consolidation issued as to the above cases.

The applicant died 6/14/2028 as the claimed result of said injury. A Joint Order Approving Compromise and Release ("OACR") issued on 4/24/2019, with an award to the deceased applicant's heirs in the sum of $270,000.00.

As noted by Petitioner MVUSD, Labor Code Section 5300 gives the appeal board jurisdiction to determine the right and liabilities among multiple

employers. In The Kroger Co., dba Ralphs Grocery Co. v. WCAB (Marquez) (2016) 81 CCC 648 (wd), it was noted, "Unlike contribution disputes between defendant arising out of one cumulative trauma injury under Labor Code Section 5500.5, which are subject to mandatory arbitration pursuant to Labor Code Section 5275(a)(2), reimbursement disputes involving successive injuries fall under the jurisdiction of the WCAB pursuant to Labor Code Section 5300(a)." The court concurs.

Labor Code Section 5500.5 provides:

"a) Except as otherwise provided in Section 5500.6 , liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury, as determined pursuant to Section 5412 , or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the next two years, the liability period for occupational disease or cumulative injury shall be decreased by one year so that liability is limited in the following manner:

For claims filed or asserted on or after:	***The period shall be:***
January 1, 1979	*three years*
January 1, 1980	*two years*
January 1, 1981 and thereafter	*one year*

In the event that none of the employers during the above referenced periods of occupational disease or cumulative injury are insured for workers' compensation coverage or an approved alternative thereof, liability shall be imposed upon the last year of employment exposing the employee to the hazards of the occupational disease or cumulative injury for which an employer is insured for workers' compensation coverage or an approved alternative thereof.

Any employer held liable for workers' compensation benefits as a result of another employer's failure to secure the payment of compensation as required by this division shall be entitled to reimbursement from the employers who were unlawfully uninsured during the last year of the employee's employment, and shall be subrogated to the rights granted to the employee against the unlawfully uninsured employers under the provisions of Article 1 (commencing with Section 3700) of Chapter 4 of Part 1 of Division 4.

If, based upon all the evidence presented, the appeals board or workers' compensation judge finds the existence of cumulative injury or occupational disease, liability for the cumulative injury or occupational disease shall not be apportioned to prior or subsequent years; however, in determining the liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment.

(b) Where a claim for compensation benefits is made on account of an occupational disease or cumulative injury which may have arisen out of more than one employment, the application shall state the names and addresses of all employers liable under subdivision (a), the places of employment, and the approximate periods of employment where the employee was exposed to the hazards of the occupational disease or cumulative injury. If the application is not so prepared or omits necessary and proper employers, any interested party, at or prior to the first hearing, may request the appeals board to join as defendant any necessary or proper party. If the request is made prior to the first hearing on the application, the appeals board shall forthwith join the employer as a party defendant and cause a copy of the application together with a notice of the time and place of hearing to be served upon the omitted employer; provided, the notice can be given within the time specified in this division.
If the notice cannot be timely given or if the motion for joinder is made at the time of the first hearing, then the appeals board or the workers' compensation judge before whom the hearing is held, if it is found that the omitted employer named is a necessary or proper party, may order a joinder of the party and continue the hearing so that proper notice may be given to the party or parties so joined. Only one continuance shall be allowed for the purpose of joining additional parties. Subsequent to the first hearing the appeals board shall join as a party defendant any additional employer when it appears that the employer is a proper party, but the liability of the employer shall not be determined until supplemental proceedings are instituted.

(c) In any case involving a claim of occupational disease or cumulative injury occurring as a result of more than one employment within the appropriate time period set forth in subdivision (a), the employee making the claim, or his or her dependents, may elect to proceed against any one or more of the employers. Where such an election is made, the employee must

successfully prove his or her claim against any one of the employers named, and any award which the appeals board shall issue awarding compensation benefits shall be a joint and several award as against any two or more employers who may be held liable for compensation benefits. If, during the pendency of any claim wherein the employee or his or her dependents has made an election to proceed against one or more employers, it should appear that there is another proper party not yet joined, the additional party shall be joined as a defendant by the appeals board on the motion of any party in interest, but the liability of the employer shall not be determined until supplemental proceedings are instituted. Any employer joined as a defendant subsequent to the first hearing or subsequent to the election provided herein shall not be entitled to participate in any of the proceedings prior to the appeal board's final decision, nor to any continuance or further proceedings, but may be permitted to ascertain from the employee or his or her dependents such information as will enable the employer to determine the time, place, and duration of the alleged employment. On supplemental proceedings, however, the right of the employer to full and complete examination or cross-examination shall not be restricted.

(d)(1) In the event a self-insured employer which owns and operates a work location in the State of California, sells or has sold the ownership and operation of the work location pursuant to a sale of a business or all or part of the assets of a business to another self-insured person or entity after January 1, 1974, but before January 1, 1978, and all the requirements of subparagraphs (A) to (D), inclusive, exist, then the liability of the employer-seller and employer-buyer, respectively, for cumulative injuries suffered by employees employed at the work location immediately before the sale shall, until January 1, 1986, be governed by the provisions of this section which were in effect on the date of that sale.

(A) The sale constitutes a material change in ownership of such work location.

(B) The person or entity making the purchase continues the operation of the work location.

(C) The person or entity becomes the employer of substantially all of the employees of the employer-seller.

(D) The agreement of sale makes no special provision for the allocation of liabilities for workers' compensation between the buyer and the seller.

(2) For purposes of this subdivision:

(A) "Work location" shall mean any fixed place of business, office, or plant where employees regularly work in the trade or business of the employer.

(B) A "material change in ownership" shall mean a change in ownership whereby the employer-seller does not retain, directly or indirectly, through one or more corporate entities, associations, trusts, partnerships, joint ventures, or family members, a controlling interest in the work location.

(3) This subdivision shall have no force or effect on or after January 1, 1986, unless otherwise extended by the Legislature prior to that date, and it shall not have any force or effect as respects an employee who, subsequent to the sale described in paragraph (1) and prior to the date of his or her application for compensation benefits has been filed, is transferred to a different work location by the employer-buyer.

(4) If any provision of this subdivision or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of this subdivision which can be given effect without the invalid provision or application, and to this end the provisions of this subdivision are severable.

(e) At any time within one year after the appeals board has made an award for compensation benefits in connection with an occupational disease or cumulative injury, any employer held liable under the award may institute proceedings before the appeals board for the purpose of determining an apportionment of liability or right of contribution. The proceeding shall not diminish, restrict, or alter in any way the recovery previously allowed the employee or his or her dependents, but shall be limited to a determination of the respective contribution rights, interest or liabilities of all the employers joined in the proceeding, either initially or supplementally; provided, however, if the appeals board finds on supplemental proceedings for the purpose of determining an apportionment of liability or of a right of contribution that an employer previously held liable in fact has no liability, it may dismiss the employer and amend its original award in such manner as may be required.

(f) If any proceeding before the appeals board for the purpose of determining an apportionment of liability or of a right of

contribution where any employee incurred a disability or death resulting from silicosis in underground metal mining operations, the determination of the respective rights and interests of all of the employers joined in the proceedings either initially or supplementally shall be as follows:

(1) All employers whose underground metal mining operations resulted in a silicotic exposure during the period of the employee's employment in those operations shall be jointly and severally liable for the payment of compensation and of medical, surgical, legal and hospital expense which may be awarded to the employee or his or her estate or dependents as the result of disability or death resulting from or aggravated by the exposure.

(2) In making its determination in the supplemental proceeding for the purpose of determining an apportionment of liability or of a right of contribution of percentage liabilities of the various employers engaged in underground metal mining operations the appeals board shall consider as a rebuttal presumption that employment in underground work in any mine for a continuous period of more than three calendar months will result in a silicotic exposure for the employee so employed during the period of employment if the underground metal mine was driven or sunk in rock having a composition which will result in dissemination of silica or silicotic dust particles when drilled, blasted, or transported.

(g) Any employer shall be entitled to rebut the presumption by showing to the satisfaction of the appeals board, or the workers' compensation judge, that the mining methods used by the employer in the employee's place of employment did not result during his or her employment in the creation of silica dust in sufficient amount or concentration to constitute a silicotic hazard. Dust counts, competently made, at intervals and in locations as meet the requirements of the Division of Occupational Safety and Health for safe working conditions may be received as evidence of the amount and concentration of silica dust in the workings where the counts have been made at the time when they were made. The appeals board may from time to time, as its experience may indicate proper, promulgate orders as to the frequency with which dust counts shall be taken in different types of workings in order to justify their acceptance as evidence of the existence or nonexistence of a silicotic hazard in the property where they have been taken.

(h) The amendments to this section adopted at the 1959 Regular Session of the Legislature 1 shall operate retroactively, and shall

apply retrospectively to any cases pending before the appeals board or courts. From and after the date this section becomes effective no payment shall be made out of the fund used for payment of the additional compensation provided for in Section 4751 , or out of any other state funds, in satisfaction of any liability heretofore incurred or hereafter incurred, except awards which have become final without regard to the continuing jurisdiction of the appeals board on that effective date, and the state and its funds shall be without liability therefor. This subdivision shall not in any way effect a reduction in any benefit conferred or which may be conferred upon any injured employee or his dependents.

(i) The amendments to this section adopted at the 1977 Regular Session of the Legislature shall apply to any claims for benefits under this division which are filed or asserted on or after January 1, 1978, unless otherwise specified in this section."

Further, Labor Code Section 5500.6 provides:

"Liability for occupational disease or cumulative injury which results from exposure solely during employment as an employee, as defined in subdivision (d) of Section 3351, shall be limited to those employers in whose employment the employee was exposed to the hazards of the occupational disease or cumulative injury during the last day on which the employee was employed in an occupation exposing the employee to the hazards of the disease or injury. In the event that none of the employers of the last day of hazardous employment is insured for workers' compensation liability, that liability, shall be imposed upon the last employer exposing the employee to the hazards of the occupational disease or cumulative injury who has secured workers' compensation insurance coverage or an approved alternative thereto. If, based upon all the evidence presented, the appeals board or the workers' compensation judge finds the existence of cumulative injury or occupational disease, liability for the cumulative injury or occupational disease shall not be apportioned to prior employers. However, in determining liability, evidence of disability due to specific injury, disability due to non-work-related causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment."

A review of the record confirms that with the deceased applicant's diagnosis of multiple myeloma and related diagnoses, that this case clearly falls into the category of "occupational disease", for which the provisions of Labor Code Section 5500.6 rather than Labor Code Section 5500.5 apply.

The next question was whether Petitioner MVUSD had met its burden of proof as against the defendant's ICW and Chubb as insurers for an employer , ". . . *in whose employment the employee was exposed to the hazards of the occupational disease or cumulative injury during the last day on which the employee was employed in an occupation exposing the employee to the hazards of the disease or injury*."

The court turned to the medical opinion relied upon by the Petition MVUSD PQME Dr. Ngo, with his last report dated 4/4/2022 (Defendant's Exhibit "I").

Referring to page 6 of the above report:

> *"So, I heavily weighted this prior exposure as a gardener before he worked at the Moreno Valley Unified School District when determining apportionment and I continue to maintain my initial opinion of 60% apportionment to prior employment and 40% to the Moreno Valley Unified School District. If so requested, I can issue an opinion regarding apportionment specifically to Moreno Valley Honda and Dodge, however I acknowledge as stated above than any apportionment my initial opinion of 60% apportionment to prior employment and 40% to the Moreno Valley Unified School District. If so requested, I can issue an opinion regarding apportionment specifically to Moreno Valley Honda and Dodge, however I acknowledge as stated above than any apportionment to that employer would be relatively minor." (Emphasis provided).*

No further delineation is provided by PQME Dr. Ngo as to the extent of exposure by the prior employer as insured by Chubb and ICW. And while the petitioner is correct that such report might suggest at least a minimal exposure to the co-defendants, the opinion does not represent substantial medical evidence upon which an award of reimbursement could be made.

Defendants Chubb and ICW relied on the opinion of defense qualified medical evaluator ("DQME") Dr. James Padova. In his report of 12/15/2021 (Defendant's Exhibit "A"), Dr. Padova noted that the applicant had actually worked for Moreno Valley Dodge for approximately five years prior to 1/31/2000, and since he would only work one evening a week with that employer when he was assigned to painting activities, that the maximum exposure to painting chemicals would have been about 7-8 weeks per year. On the basis of this exposure, Dr. Padova did not believe the deceased applicant's employment at Moreno Valley Dodge had a causative connection to his diagnosis of multiple myeloma.

As to the burden of proof on this matter, this rested with the Petitioner MVUSD pursuant to Labor Code Section 5705:

"The burden of proof rests upon the party or lien claimant holding the affirmative of the issue. The following are affirmative defenses, and the burden of proof rests upon the employer to establish them:

(a) That an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his or her injury actually performing service for the alleged employer.

(b) Intoxication of an employee causing his or her injury.

(c) Willful misconduct of an employee causing his or her injury.

(d) Aggravation of disability by unreasonable conduct of the employee.

(e) Prejudice to the employer by failure of the employee to give notice, as required by Sections 5400 and 5401."

It was the court's conclusion that the opinion of PQME Dr. Ngo upon which Petitioner MVUSD relied, did not represent substantial medical evidence upon which a finding of liability could be made as against defendant's ICW and Chubb, specifically in that it failed to establish the degree of causation which would otherwise be attributable to defendant's Chubb and ICW. For this reason, the court did not further consider the opinion of DQME Dr. Padova as to whether it is more persuasive than the opinion of Dr. Ngo as to causation (or lack thereof).

It was therefore the determination that Petitioner MVUSD take nothing further by way of its Petition.

V

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

DATE: 6/17/2022

ROBERT HILL
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE