**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**THOMAS BUTTS,** ***Applicant***

**vs.**

**BUTTS & JOHNSON;**
**SENTINEL INSURANCE COMPANY**
**administered by THE HARTFORD,**
***Defendants***

**Adjudication Number: ADJ14033416**
**Salinas District Office**

# OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**JULY 3, 2023**

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

**THOMAS BUTTS**
**ALBERT & MACKENZIE**
**BORAH & SHAFFER**

**LN/*pm***

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

**REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION**

## I
## INTRODUCTION

Defendant, by and through her attorney of record, filed a timely, verified Petition for Reconsideration on May 12, 2023, challenging the Findings, Award and Order of April 24, 2023, finding applicant sustained and industrial injury in the form of COVID-19 and its sequelae while working as a worker's compensation applicant attorney on March 12, 2020.

## II
## PROCEDURAL HISTORY

Dr. Suresh Mahawar began this case as the Panel Qualified Medical Evaluator and issued reports dated December 3, 2020, October 14, 2021, and June 1, 2022 (APPL EX. 1, 2, and 3, respectively).

At trial set for April 18, 2022, the first two reports of Dr. Mahawar were completed and in evidence, but unfortunately, the reports did not address the proper legal standard for non-occupational diseases. At trial, the WCJ issued a minute order directing the parties to request a supplemental report from PQME Dr. Mahawar, referring him to the relevant case law and compensability test/exception and asking him to issue an opinion on whether applicant's job as an attorney representing injured workers presented an increased risk of contraction of COVID- 19 as compared to the general public.

In response, PQME Mahawar issued a report dated June 1, 2022, and the matter proceeded to trial on June 30, 2022, where testimony was taken by the applicant and the matter was submitted for decision on July 14, 2022, following receipt of post-trial briefs.

On August 15, 2022, the WCJ rescinded the order submitting the matter for decision and ordered further development of the record pursuant to *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389 and *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 CCC 138. PQME Mahawar's report of June 1, 2022, was a total of seven sentences and failed to adequately address whether applicant had increased risk to exposure of a non- occupational disease pertaining to applicant's job duties as an injured workers' attorney. (A-3)

At the Status Conference of September 6, 2022, a discovery plan was agreed upon by the parties with the WCJ to issue three names of qualified physicians to address the correct legal standard of causation in this case. Each party was afforded a strike and Dr. Bruce J. Dreyfuss was the remaining physician. The WCJ appointed Dr. Bruce J. Dreyfuss as a Regular Physician by order dated September 7, 2022. Dr. Dreyfuss evaluated the applicant on January 16, 2023, and issued a report dated February 13, 2023, and a supplemental report dated February 20, 2023.

At the Mandatory Settlement Conference of April 11, 2023, the parties jointly moved to have the matter submitted directly for decision with judicial notice of prior pre- and post-trial briefs and an agreement that the matter would stand submitted for decision on April 21, 2023. This allowed additional time for filing of an amended PTCS solely for the purpose of including the addition of the two reports of Dr. Dreyfuss as joint exhibits and for the court reporter to prepare Minutes of Hearing of the MSC. No request for additional discovery was requested by either party.

The report of Dr. Dreyfuss dated February 13, 2023, was identified as JOINT EXH. 1 (J-1) and the report of Dr. Dreyfuss dated February 20, 2023, was identified as JOINT EXH. 2 (J-2). The reports were admitted into evidence per court reporter MOH of Mandatory Settlement Conference dated April 11, 2023, and by disposition and order of the WCJ on the PTCS dated April 12, 2023.

The Findings, Award, and Order issued on April 24, 2023, and a timely petition for reconsideration was filed by defendant on May 12, 2023. As of the date of this report, no answer has been received by applicant.

## III
## DISCUSSION

### INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

The court reviewed the evidence submitted by the parties, both documentary and testamentary. Based on the same, including, but not limited to, the testimony of the applicant, and medical reporting of Court Appointed Regular Physician Bruce J. Dreyfuss, M.D. dated February 13, 2023, and February 20, 2023, it was found that Applicant Thomas Butts sustained injury AOE/COE on March 12, 2020, as a result of contracting COVID-19 and compensable sequences thereof.

It is acknowledged and noted for the record that the Labor Code Section 3212.86 presumption was not raised nor is it applicable in this case. The presumption applies to employees who performed labor or services at the employer's place of employment at the employer's direction on or after March 19, 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. In the instant case, the last date of service of applicant was March 12, 2020, falling just outside of the presumptive period.

### NON-OCCUPATIONAL DISEASES

As explained in the Opinion on Decision, non-occupational diseases such as a flu or virus, common bacterial infections, such as bronchitis, sinusitis or pinkeye by law are normally not considered work related injuries. COVID-19 would clearly fall under this classification, i.e., a non-occupational disease. Despite the fact that the disease may have been contracted from a co-worker on the premises, such diseases

are not considered related to work because it is difficult to discern their origin and are so prevalent as to make their connection to work doubtful. The California Supreme Court has stated that liability for non-occupational diseases is narrower than physical injuries in the workplace. "The fact that an employee contracts a disease while employed or becomes disabled from the natural progression of a nonindustrial disease during employment will not establish the causal connection." Furthermore, "[a]n ailment does not become an occupational disease simply because it is contracted on the employer's premises." (*LaTourette v. WCAB* (1998) 63 CCC 253, 258; see also *Johnson v. IAC* (1958) 23 CCC 54, 55).

The court explained that the narrower rule for non-occupational disease denotes the problems of determining causation when the source of injury is of uncertain etiology, such as with widespread viral, bacterial or other pathological organisms. The court further explained that non-occupational disease should be treated differently because of the high cost of avoidance and treatment, coupled with the fact that such illnesses often cannot be shown with certainty to have resulted from exposure in the workplace. (*LaTourette, supra* at pp. 258-259). In the case at hand, it is undisputed that applicant did not show *with certainty* that contraction of COVID-19 resulted from exposure in the workplace.

However, there are two exceptions that allow non-occupational diseases to be found industrially related. The applicable exception to the general rule of non-compensability for non-occupational diseases provides that ***a non-occupational disease is compensable if the employee is subject to an increased risk compared with that of the general public***. (*Id* @ p. 259)(emphasis added). More specifically, whether applicant's work as a worker's compensation attorney representing injured workers subjected applicant to an increased risk compared with that of the general public. This is the core issue presented in this case.

**THE UNCONTROVERTED MEDICAL EVIDENCE SUPPORTS A FINDING THAT APPLICANT'S JOB AS AN ATTORNEY FOR INJURED WORKERS SUBJECTED HIM TO AN INCREASED RISK COMPARED TO THAT OF THE GENERAL POPULATION**

"The applicant for workers' compensation benefits has the burden of establishing the 'reasonable probability of industrial causation'" (*LaTourette, supra,* citing *McAllister v. Workmen's Comp.Appeals Bd.* (1968) 33 Cal.Comp.Cases 660.) All findings of the WCAB must be based on substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 35 Cal.Comp.Cases 16]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604,620 [Appeals Bd. en banc].) Reports that contain an erroneous or inadequate history do not constitute substantial medical evidence upon which the WCJ can rely. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 36 Cal.Comp.Cases 1993; *Zemke v. Workmen'sComp. Appeals Bd.* (1968) 33 Cal.Comp.Cases 358.)

Court appointed Regular Physician, Dr. Richard Dreyfuss evaluated the claimant one time and issued his initial report on February 13, 2023 (J-1), and one

supplemental report dated February 20, 2023 (J-2), the latter merely acting as an addendum to the initial report, requesting additional studies. The initial report of Dr. Dreyfuss, provided a history of the onset of applicant's symptoms on March 14, 2020, to which applicant attributed to exposure to COVID-19 at a Worker's Compensation Appeals Board two days prior on March 12, 2020. (J-1, @ p. 2).

Relying on studies regarding the first COVID-19 strain to which applicant was subjected, Dr. Dreyfuss concluded 97.5% of individuals who became ill developed symptoms between 2 and 11.5 days after exposure. "As Mr. Butts became symptomatic on the afternoon of March 14, 2020, it is 97.5% probable his exposure occurred between March 3, 2020, and March 12, 2020." (J-1, @ p. 21).

Dr. Dreyfuss summarized factors as updated by the CDC that increase the likelihood of becoming infected: length of time in contact with an infected person; degree of coughing of the infected person; presence or absence of symptoms of the infected person; mask wearing by either infected individual or the patient or both; ventilation and filtration of the space in which contact took place; and the distance from the infected individual. (J-1 @ p. 21).

Mr. Butts related to Dr. Dreyfuss that while at the Board on March 12, he spent a total of approximately 1 ½ hours in the small conference room with his established client, Javier Romas, as well as Mr. Romas' relative, who asked Mr. Butts questions about his own work comp case. Both Mr. Romas and his relative appeared ill and symptomatic with cough. Mr. Butts related that sometime after the March 12, 2020, MSC, his secretary had been called by his established client Mr. Romas, who informed his secretary that he had become quite ill from COVID. Moreover, applicant did not recall coming into contact with any other individual who was ill over the time interval of interest. (J-1, @ p. 21).

Regarding causation, Dr. Dreyfuss went on to state, "The March 12, 2020, exposure during the MSC not only placed Mr. Butts at high risk of contracting Covid but also of developing severe illness from the Covid. I consider it reasonably medically probable Mr. Butts became infected with Covid during that March 12, 2020, MSC." (J-1 @ p. 21).

In formulating this conclusion, Dr. Dreyfuss relied upon the history provided by Mr. Butts at the time of the evaluation. Specifically, providing:

"*Mr. Butts has described that at the San Jose Board attorneys meet with their client in a small room set off of a larger waiting room. Mr. Butts indicated the room was approximately the same size of my examining room, which is 8 feet x 10 feet. Within that room, Mr. Butts spent approximately 1-1 ½ hours meeting with his initial client and the pro bono client. He was within a few feet of either or both of them throughout that entire time. It is noted that this 60–90-minute time was a collective time, he met interruptedly with the pro bono client for about 15-20 minutes but would enter and leave the conference room and talked with his established client to discuss the offers and conditions following meeting with the defense attorney. The small conference room was necessarily private, and the door was closed during discussions in order*

*to protect the attorney client privilege. Mr. Butts indicated he routinely attended the board for conferences and hearings and regularly conferred with clients in the small conference room*." (J-1, @ p. 21).

Dr. Dreyfuss correctly pointed out that on March 12, 2020, the date of the Mandatory Settlement Conference, could only be conducted at the San Jose board, that this location was a necessary place to conduct business, and it is considered a workplace of Mr. Butts. (J-1, @ p. 21). Supporting this unique situation was applicant's testimony both in his deposition and at trial. Specifically, applicant testified in his deposition that he was approached by a gentleman at the San Jose WCAB on March 12, 2020, asking questions about his worker's compensation case. Applicant testified he spoke with him about 15-20 minutes in a small room. Neither wore a mask. (DEF. EX. D-5, p. 12, lines 6- 11).

This history was confirmed by applicant's trial testimony on direct examination by applicant's counsel, in relevant part,

"*The San Jose Board is located in the Alquist State Building on the second floor. There is a room set aside for attorney conferences, Room 210. This is a bigger room where people sit, waiting for their conference, and there is a smaller room off of this room that allows an attorney to speak privately with their client. That room is less than half the size of the hearing room in which this trial took place.*

*When meeting with his client and the other gentleman in the smaller attorney-client room, the door was closed, and an interpreter was present with his client and his client's friend. There was no one else in there." (SOE, p. 6, lines 7-11).*

*"He sat at a conference table with his client to his right, as he was sitting at the end of the table and was less than two feet apart from his client. During the course of the morning, he spoke with his client and defense attorney for approximately two and a half hours, until finally the case came to a resolution. During the course of this back and forth of coming in and showing settlement numbers to his client, his client was coughing and sweating and told him he was not feeling well but felt he had to be there because he had a notice telling him to be there.*

*In addition to his client, either his client's brother, cousin or friend was there, and his client asked him to speak with him, as he had some legal questions. That gentleman was also coughing and sweating and looked like he did not feel well." (SOE, p. 4, lines 1-9).*

Similarly, on cross examination by defense counsel, in reconciling applicant's deposition testimony with the trial testimony, applicant testified in relevant part,

"*Applicant could not recall the exact date of his deposition of 3/20/21. At page 12, beginning line 4 and continuing, Defense counsel recounted questions as to how Applicant believed he was infected with COVID. The testimony was summarized that Mr. Butts had been approached by a person who was in pro per, and he spent time*

*speaking with that person for approximately 15 to 20 minutes. That person appeared feverish and was coughing and sweating.*"

There was a request to clarify the inconsistency between the deposition testimony and the trial testimony. *Applicant testified that at the time of the deposition on 3/20/21, his memory was not very good at that time due to difficulties with the effects of COVID and how well he was functioning. With regard to the pro per worker and the communications, the 15- to 20-minute time estimate was probably correct as to the amount of time that he spoke with that particular gentleman."* (SOE, pp. 6, lines 18-25 and p. 7, lines 1-2).

Petitioner asserts the trial testimony as outlined above and applicant's deposition testimony are contradictory establishing applicant is not a credible witness. The WCJ acknowledges some discrepancies in the details of how applicant came into contact with an individual in addition to his client, but the general thrust of the testimony is consistent. Namely, in both deposition and at trial applicant testified he spent approximately 15-20 minutes with this other individual who appeared feverish, sweaty and coughing. The details of how applicant met this person, i.e., ran into him verses met with him in an enclosed room with his client, are not mutually exclusive. Said testimony can be true on both counts.

In addition, petitioner correctly points out that applicant did not report at his deposition that his client was ill or feverish, but at trial indicated that he had been reminded by the interpreter present on March 12, 2020, that his client had also been ill. This reportedly served to refresh applicant's recollection and applicant testified at trial as to potential exposure to his client who reportedly was also feverish during their meeting in an enclosed room at the San Jose board. Applicant swore under oath that his memory at the time of deposition of 3/20/21 was not very good due to the effects of COVID and how well he was functioning at the time. Keeping in mind, the deposition was held approximately eight months following release from the hospital where applicant had been comatose for approximately three months.

More specifically, the initial PQME report of Dr. Mahawar dated December 3, 2020, provides an accurate history pertaining to applicant's hospital stay:

"*He sought out medical attention at the emergency room, at Kaiser Permanente in San Jose on March 21, 2020. He was diagnosed with COVID-19. He was hospitalized until July 10, 2020. On March 26, 2020, he went into a coma until June 12, 2020. He was informed that during his stay, he developed pneumonia, a collapsed lung, he suffered blood clots, and underwent kidney dialysis on eight occasions, and medications were administered. An EMG/NCV was obtained of the lower extremities. A tracheotomy was completed, and he lost about 58 pounds while in the hospital. During his stay, he developed an ulcer in his lower back, which recently closed. He was released from the hospital and was transported via ambulance to his home. Medications were prescribed and he has followed up with his personal physician and rehabilitation specialist via video conference. He was provided with home nursing and therapy.*

*He was also examined by a Neurologist. He underwent an EMG/NCV of the lower extremities, due to experiencing numbness and tingling in the left foot and toes.*

*Since developing COVID-19, he developed numbness in his left foot and toes, incontinence, depression, sleep loss, lack of concentration, and focus."* (APPL EXH. 1, @ p. 2).

Given the severity of applicant's reaction to Covid-19, prolonged coma, need for home care, reports of lack of concentration and focus, some leeway was given by the WCJ in finding the change in testimony to be credible.

Petitioner further asserts that March 12, 2020, predated the governor's presumption period (which is undisputed by the parties), but also asserts that since this was the pre-presumptive period and the Alquist Building (San Jose WCAB) is open to the public, applicant was at no greater risk than the general public on March 12, 2020, to be exposed to Covid-19. Specifically, petitioner relies on *McKeown v. WCAB* (1988) 53 Cal. Comp. Cases 332 (writ denied), wherein the Appeals Board found that a bakery delivery driver's Hepatitis A was not compensable. The delivery driver contracted hepatitis from eating a donut he purchased at one of his stops, a coffee shop. There was a hepatitis outbreak in the community that was traced to the bakery that made the donuts for the coffee shop. The Appeals Board concluded that the delivery driver was not subject to exposure that was different than the general public because the ingested substance was in general circulation in the community.

Petitioner's reliance on *McKeown* is misplaced. As petitioner claims, it is undisputed that simply having interactions with people in the general public does not mean applicant's employment places him at a higher risk of contracting Covid-19. However, the issue as to whether risk of exposure to the applicant was unique or greater than the general public is disputed. Petitioner claiming there was no evidence that applicant's work as an injured worker's attorney at the San Jose board was unique or special in the risk it imposed for the transmission of Covid-19.

The WCJ respectfully disagrees with petitioner and agrees with PQME Dreyfuss' analysis. As stated in the Opinion on Decision, Dr. Dreyfuss relied on the history provided by applicant, history of the onset of COVID-19 into the United States in early 2020, and the understanding of the *unique* situation attorneys for injured workers face when meeting with their clients to conclude injured worker attorneys are in an *exceptionally unique* situation for increased risk of exposure due to meetings with injured workers in private places as compared to the general population (emphasis added). In *McKeown*, the applicant ingested a donut that was circulating in the general population and contracted hepatitis. In the instant case, Mr. Butts' work as an injured worker attorney placed him in a unique situation of meeting with clients in enclosed spaces for prolonged periods of time. This is in contrast to other members of the public which could be at the San Jose board or at the Alquist Building at the same time.

Similarly, petitioner's reliance on *Pattiani v. IAC* (1926) 199 Cal. 596, wherein the supreme court upheld a finding denying benefits to an employee who went on a

business trip and contracted typhoid fever is misplaced. The commission held and the Supreme Court agreed that the fact that he was required to go to New York by his employment did not "constitute a special exposure arising out of employment but was in fact an exposure or risk of the commonalty in general and not peculiar to or characteristic of said employment." The mere fact that there was a typhoid epidemic in New York while the employee visited it was insufficient to show special exposure arising out of his employment.

Petitioner argues that applicant being placed by his employment at the San Jose board where the Covid-19 pandemic was in its early stages *alone*, does not result in his employment putting him at increased risk. This is not disputed by the WCJ or Dr. Dreyfuss. The distinguishing factor is that as an applicant attorney, one has special rooms dedicated to confidential conversations between an injured worker's attorney and his or her client. This is even distinguished from that of a worker's compensation defense attorney who would not routinely meet in a confined area with their client. Rather, the defense attorney would seek a location that is remote, without the presence of others, and phone their client to discuss the legal issues presented at the WCAB court proceeding. Applicant attorneys have a special and unique role which places them at a greater risk than the general public by the routine and necessary meetings with their clients in small, enclosed rooms designated for such meetings. Such was the case here.

Dr. Dreyfuss further elaborated and distinguished routine meetings at the WCAB, Pre-Covid as compared with the time on and around March 12, 2020, where the COVID-19 pandemic was at its inception. He stated, "Once Covid struck, the mandatory meetings and conferences carried with them a very significant health risk. As the MSC could only take place at the board and his client, with whom he had a prolonged, unmasked and within-6-feet-of-each-other meeting in the small conference room… I consider the MSC at the board to have placed Mr. Butts at a higher risk for contracting Covid than he experienced out in the general community or even at his other principal place of work, his office." (J-1, @ p. 23).

Petitioner points out that the emergency order quoted by Dr. Dreyfuss actually issued April 29, 2020, after the shelter in place emergency order was in place as well as additional emergency orders mandating either no gatherings or small gatherings and social distancing. Petitioner interprets this order to mean that only after the order went into effect would courts be considered high risk because the courts would require gatherings of more people than permitted. And, prior to this order, the courts posed no greater risk than any other public place.

Petitioner's point is taken, but it does not negate the fact that an injured worker's attorney seven weeks before this statement was made and one week prior to the presumptive period was at a greater risk than the general public. The specific court set up for injured worker attorneys at the San Jose WCAB to meet with their clients at the inception of the Covid-19 pandemic carried with it the inherent increased risks as described by Dr. Dreyfuss.

Finally, Dr. Dreyfuss, concluded his report, "In light of the severity and potential lethality of contracting COVID, its principle method of transmission, the close quarters during which Mr. Butts interviewed his clients, as well as the general judicial recognition that courts are places of high risk, I consider Mr. Butts' employment as a workers' compensation attorney subjected him to an increased risk of contracting COVID compared with that of the general public. Accordingly, I consider Mr. Butts' Coronavirus illness (COVID-19) to have arisen out of and in the course of his employment." (J-1, @ p. 23).

It is not necessary for the applicant to prove the person or persons he was in contact with on March 12, 2020, in fact had COVID-19; rather, that industrial medical causation was reasonably medically probable and that the applicant was at an increased risk as compared to the general population to contract the disease. Dr. Dreyfuss has provided substantial medical evidence on both of these issues and that evidence meets applicant's burden of proof in the instant case.

Lastly, as to petitioner's claim that defendant may have been deprived of their due process rights given applicant's change and/or additional testimony at trial as compared to the testimony given at deposition, petitioner was afforded opportunity to request further development of the record when granted authority to file post-trial briefs and also when this matter was set for a Status Conference following the parties receipt and filing of PQME Dreyfuss' reports. Defendant chose not to request further discovery in the form of a deposition of applicant's client or his client's friend/family member or applicant's secretary. Petitioner made an affirmative decision to move forward on the current record relying on issues of credibility of the applicant and a legal argument that attorneys for injured workers would not be at increased risk compared to the general public. Given the totality of the testimony of the applicant between deposition and trial and the reporting of Dr. Dreyfuss, the WCJ has based the Findings, Award and Order of April 24, 2023, on the applicable legal standard and substantial, credible evidence.

## IV
## RECOMMENDATION

For the foregoing reasons, it is recommended that the WCAB deny Defendant's Petition for Reconsideration.

DATE: May 18, 2023,

**Kathleen A. Chassion**
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE