

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

**CHRISTOPHER JOHNSON (DEC), *Applicant***

**vs.**

**COUNTY OF SAN DIEGO; permissibly self-insured, *Defendants***

**Adjudication Number: ADJ11164231  
San Diego 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.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

We observe, moreover, it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**ANNE SCHMITZ, DEPUTY COMMISSIONER**  
**CONCURRING NOT SIGNING**



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

**September 28, 2021**

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

**CHLOE JOHNSON  
COUNTY OF SAN DIEGO  
CUNNINGHAM & MCLEAN**

**PAG/oo**

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

**Report and Recommendation  
On  
Petition For Reconsideration**

**Nature of Petition**

Defendant has filed a timely, properly verified petition for reconsideration on recognized statutory grounds of a decision issued July 8, 2021. By that decision, the workers' compensation judge (WCJ) found that applicant (hereinafter "decedent") had sustained an injury to his heart which resulted in his death (AOE/COE). As such, decedent's injury was cardiovascular in nature subject to the presumption pursuant to Labor Code section 3212.5. Defendant contends the WCJ erred in that (1) by the order, decision or award the WCJ acted without or in excess of his powers and that (2) the evidence does not justify the Findings of Fact and (3) the Findings of Fact do not support the Order, Decision, or Award.

Applicant has filed a timely answer to the defendant's petition.

**Statement of Relevant Facts**

Decedent was a deputy sheriff for 28 years. He worked from 1988 to 2016. His death occurred on November 15, 2017.

In the weeks preceding decedent's death, decedent and his fiancé Ms. Sherri Lynn Dunlap planned to attend a wedding in Michigan. Ms. Dunlap was sufficiently concerned about decedent's health that she took the affirmative step of requiring him go to the Kaiser emergency room in September of 2017. Decedent's symptoms at the time were chest pain, arm numbness, and shortness of breath (see MOH-SOE, April 21, 2021, page 4, lines 9-16).

According to Ms. Dunlap, in the months before his death, decedent's physical condition had progressively grown worse. Although decedent was an active person, he was unable to exercise without difficulty and shortness of breath. He was required to use a runner in softball because he could not run to first base (see MOH-SOE, April 21, 2021, page 4, lines 20-24).

While at the emergency room decedent underwent an EKG. The EKG came back normal. However, an additional stress test was done the following month in October 2017. The second EKG came back abnormal. Decedent was advised that he did not have cardiac disease but did have a scar from his youth that was causing the abnormality in the EKG (see MOH-SOE, April 21, 2021, page 5, lines 5-15).

Decedent went to the wedding with his fiancé. While there they were required to use an outhouse. The walk to and from the outhouse caused decedent shortness of breath. That night the decedent passed away. While passing decedent was seen by his fiancé clutching his chest. The death certificate indicated that the decedent passed from probable cardiac ischemic event which resulted in death in minutes (see death certificate, EAMS number 65935151; see also MOH-SOE, April 21, 2021, page 5, lines 22-25; page 6 (in its entirety); page 7, lines 1-10).

After review of the evidence, the WCJ found Ms. Dunlap credible and deemed the PQME reports of Dr. Bower non-substantial on the issue of AOE/COE in a decision issued on July 8, 2021.

Defendant filed a petition for reconsideration on July 30, 2021. As the WCJ had a two week vacation commencing on August 1, 2021 and did not receive the petition for reconsideration until his return on August 16, 2021. **The Board awarded the WCJ an extension to reply until August 25, 2021.**

### **Discussion**

- 1. Petitioner contends that the presumption of Labor Code section 3212 does not apply as there is no substantial medical evidence that decedent died from heart trouble.**

In his decision, the WCJ relied upon Labor Code section 3212.5 which provides that:

“In the case of a member of a police department of a city or municipality, or a member of the State Highway Patrol, when any such member is employed upon a regular, full-time salary, and in the case of a sheriff or **deputy sheriff**, or an inspector or investigator in a district attorney s office of any county, employed upon a regular, full-time salary, the term injury as used in this division includes **heart trouble** and pneumonia which develops or manifests itself during a period while such member, sheriff, or deputy sheriff, inspector or investigator is in the service of the police department, the State Highway Patrol, the sheriff s office or the district attorney s office, as the case may be. The compensation which is awarded for such heart trouble or pneumonia shall include full hospital, surgical, medical treatment, disability indemnity, **and death benefits** as provided by the provisions of this division.” (Emphasis added).

Additionally, Labor code section 3212 provides that:

The hernia, heart trouble, or pneumonia so developing or manifesting itself in those cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. **The presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.** (Emphasis added).

Here the evidence indicates that the decedent, who had been a deputy sheriff for 28 years, had developed or manifested heart trouble one year after he retired in 2016. As such, the WCJ found that the presumption afforded to a deputy sheriff under Labor Code section 3212.5 applied.

Defendant contends that there is no substantial evidence to support this finding because there is no evidence that applicant's heart trouble caused the applicant's death. The WCJ disagrees with this assessment. The evidence establishes that the decedent had developed heart trouble during the statutory presumption period to trigger the presumption (decedent would have been entitled to the full 60 month period after he no longer worked in 2016). The mere presence of heart trouble in 2017 is sufficient to trigger the presumption. Defendant failed to rebut this presumption with credible evidence.

The WCJ based his opinion in part on the certificate of death which indicated probable cardiac ischemic event that would have resulted in the death of the decedent within minutes of onset (see document EAMS number 65935151, which the WCJ took judicial notice of at trial, see MOH-SOE, April 21, 2021, page 2, second paragraph).

Additionally, in the Kaiser reports, chest pain was clearly indicated as the reason for the applicant's call to Kaiser Permanent on **September 30, 2017** (see applicant's exhibit 1 under heading "Reason for Call/Visit"). The diagnosis from the visit also notes "Chest pain; CAD (**Coronary Artery Disease**); **Ventricle Aneurysm**" (applicant's exhibit 1, bate stamp 000816, emphasis added). "Chest pain" is also identified on that same page as the applicant's diagnoses. It was further noted that the decedent had had "feeling of needles in his left chest from last 4 days" (applicant's exhibit 1, bate stamp 000816). The applicant underwent an ECG which produced abnormal findings (applicant's exhibit 1, bate stamp 000817). The differential diagnosis as of that date included "myocardial infarction" or heart attack (applicant's exhibit 1, bate stamp 000880).

Decedent was admitted to the hospital. **This is only months before the decedent died on November 15, 2017.**

In addition to the reports, the WCJ also had the benefit of the credible testimony of Ms. Sherrie Lynn Dunlap who corroborated the findings in the Kaiser medical records. Ms. Dunlap was with the decedent at the time of his death and watched his death (and provided vivid testimony of his passing at trial). She was also with the decedent in the months leading up to his death (see below for specific references to Ms. Dunlap's testimony when discussing the substantiality of Dr. Bower's reports).

Relying on the certificate of death, the Kaiser records, and the compelling credible testimony of Ms. Dunlap, the WCJ concluded that decedent had sufficiently demonstrated that his heart trouble manifested during the statutory presumption period, triggering the presumption. As such, decedent's estate would be entitled to seek death benefits.

**2. Petitioner contends that the death certificate should not be used to find that the decedent died from heart trouble as required under Labor Code section 3212.**

As noted above, the death certificate was one piece of evidence that was used by the WCJ. The WCJ did not rely solely upon the death certificate. Equally compelling evidence was presented in the form of the Kaiser records and Ms. Dunlap's testimony.

The WCAB "is empowered to choose among conflicting medical reports and rely on that which it deems most persuasive. (*Painter v. Workers' Comp. Appeals Bd.* (1985) 166 Cal.App.3d 264, 269.) The relevant and considered opinion of one physician, though inconsistent with other medical opinions, generally constitutes substantial evidence. (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372; *Patterson v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 916.). Here the WCJ has concluded that **the Kaiser records clearly indicate that the decedent had developed heart trouble prior to the decedent's death.** The WCJ finds that combined with the credible testimony of decedent's fiancé as well as the death certificate that death was likely caused by a probable cardiac ischemic event but in any event, decedent's heart trouble is clearly indicated in the Kaiser records and did manifest during the statutory time to trigger the presumption.

3. **Petitioner contends that the findings of fact are not supported by substantial evidence.**

As the WCJ concluded that the presumption of Labor Code section 3212.5 applies, the burden of proof shifts to the defendant. Petitioner here attempts to bolster its argument with references to Dr. Bower's reporting.

The WCJ in his opinion on decision determined that the reporting of Dr. Bower was not substantial and therefore defendant could not controvert the application of the presumption in this case (for a full detailed analysis see the WCJ's opinion on decision).

Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) Accordingly, the WCJ must scrutinize the underlying facts relied upon by the physician, to determine whether or not his opinion constitutes substantial evidence. **If the facts relied upon lack probative value, so does the medical report.** (*Turner v. Workers' Comp. Appeals Bd.* (1974) 42 Cal.App.3d 1036 [39 Cal.Comp.Cases 780], (emphasis added).) (See also *National Convenience Stores v. Workers' Comp. Appeals Bd. (Kesser)*, (1981) 120 Cal.App.3d 420, 46 Cal.Comp.Cases 783; *Wehr v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 188, 50 Cal.Comp.Cases 165.)

Here, it is quite clear that Dr. Bower's reporting cannot constitute substantial medical evidence. Firstly, as noted in his deposition, Dr. Bower's initial report was issued without a review of all of the relevant medical records (See Dr. Bower's deposition testimony, joint exhibit CC, page 7, and Dr. Bower's supplemental report dated June 10, 2019, joint exhibit AA, page 3) and as such it is, on its face, non-substantial.

Additionally, the reports of Dr. Bower are riddled with factual errors. In his initial report, the doctor relied heavily upon statements obtained from the decedent's son. However, the decedent's son was not present with the decedent at the time of his death. The doctor did not interview Ms. Dunlap, who witnessed the decedent's deteriorating condition in the months preceding his death, and was with decedent up to the very last moments of his life.

By way of numerous examples of factual errors in his reporting, Dr. Bower cites as evidence for non-cardiac etiology of death that decedent "ambulated to the outhouse and back with no apparent/reported difficulties. He spoke with all family members and his fiancé and fell back to sleep expressing no difficulties or symptoms to anyone". (Joint exhibit BB, page 20). **This is**

**erroneous. The credible testimony of decedent’s fiancé was that while going to the outhouse, the decedent complained that he was having a “hard time breathing”. Sher further testified that while driving to the cabin decedent complained that he wasn’t feeling well. Decedent further complained that the room felt stuffy and he was having a hard time breathing.** (See MOH-SOE, April 21, 2021, page 5, line 25; page 6, lines 1-12).

Dr. Bower also states that “the description of his last moments is very nonspecific” (joint exhibit CC, page 10, lines 20-21). **This again is erroneous. At trial, Ms. Dunlap credibly testified to the specifics of the decedent’s death including that the decedent was clutching his chest at the moment of death.** (See MOH-SOE, April 21, 2021, pages 6 through 7).

Dr. Bower also states that there was insufficient evidence to demonstrate cause of death because there “were no definitive witnesses to events that may have preceded Deputy Johnson’s death” (joint exhibit AA, page 18). **This again is erroneous. As noted above, Ms. Dunlap was with decedent right up to the moment of his death. She witnessed his death. She further witnessed the deterioration of applicant’s condition in the months and hours preceding his death. She advised applicant to undergo evaluation with Kaiser for his chest pain and shortness of breath. This was due to a concern that he was having heart trouble.** (See MOH-SOE, April 21, 2021, pages 4-10).

Similarly, the doctor in his reporting cites evidence to support his opinion which is clearly controverted by the record. By way of example, in joint exhibit BB, under “**Evidence of Exposure**” commencing on page 19, Dr. Bower states that though decedent was in a “demographic that would make a cardiac etiology of sudden death **more likely** (male over 50 years old, probably history of hypertension, established coronary artery disease) a number of factors make a cardiac etiology **less likely** in the present case including evidence that **applicant was capable of fairly vigorous exercise levels in January of 2017**”. He further notes that “Chest pain was not reported in the medical records in relation to this type of activity”.

However, the evidence indicates that in the months before decedent’s death, eleven months later, decedent could not engage in “fairly vigorous exercise levels”. In her testimony, Ms. Dunlap indicated that the decedent’s physical condition was growing progressively worse. Decedent was having a hard time exercising. He experienced shortness of breath while exercising. He could not run to first base in softball and had to use a runner. He was experiencing chest pain and numbness in his arm. He was required to go to the emergency room. He underwent two EKGs with one

producing and abnormal finding (see MOH-SOE, April 21, 2021, pages 4 and 5). Consequently, using the doctor's own logic, the relevant germane and contemporaneous evidence indicates that applicant's death was more likely than not cardiac in nature.

Petitioner notes that "The Judge finds it problematic that Dr. Bower did not provide a specific cause of death" (see petition page 12, lines 12-13). The WCJ did not find this problematic in his decision and disagrees with this characterization.

As noted in the WCJ's decision, the purpose of a presumption is to shift the burden of proof. Decedent's medical records prior to his death include a diagnosis of "Chest pain; CAD (**Coronary Artery Disease**); **Ventricle Aneurysm**" (applicant's exhibit 1, bate stamp 000816, emphasis added. Once heart trouble is established, the burden shifts to the defendant. Defendant must therefore provide evidence to controvert the presumption.

In his initial report dated January 18, 2019, Dr. Bower concludes that the cause of the applicant's death is unknown (see joint exhibit BB, page 18). He therefore offers no credible alternative rationale as to why the decedent died. Consequently, as the presumption shifts to the defendant, and defendant cannot offer any alternative theory for the death of the applicant, the defendant has failed to provide any credible evidence to controvert the presumption.

Regarding Dr. Bower's supplemental report dated June 10, 2019, the doctor indicates that applicant only falls within the presumption if he can establish that *his death* was due to heart trouble. This misstates the basis of the presumption further undermining the credibility of the doctor.

The correct legal theory, also identified in the report, appears during the deposition from the defense attorney: "if there is heart trouble he falls within the presumption". It is not the applicant's death but "heart trouble" that triggers the presumption. It is therefore apparent that the doctor is operating under an incorrect legal theory (see for example joint exhibit AA, page 18; see also page 25, second, third and fourth paragraphs under heading "Explanation") one which informs and undermines his entire reporting.

### **Recommendation**

It is therefore respectfully recommended that the Petition for Reconsideration be denied.

DATE: August 24, 2021

**Mark Romano**  
WORKERS' COMPENSATION JUDGE