

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

DAVID KIM, *Applicant*

vs.

**SHOULDA BEEN THERE, LLC, DBA THE FAT FISH; MID-CENTURY INSURANCE
COMPANY, *Defendants***

**Adjudication Number: ADJ11342807
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, and for the reasons discussed below, we will deny reconsideration.

It is well established that for the purpose of meeting the causation requirement in a workers' compensation injury claim, it is sufficient if the work is a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291 [80 Cal.Comp.Cases 489].) "...[T]he proximate cause requirement of Labor Code section 3600 has been interpreted as merely elaborating on the general requirement that the injury arise out of the employment. The danger from which the employee's injury results must be one to which he or she was exposed in the employment." (*Id.*, at 297 - 298 [citations omitted].) The acceleration, aggravation or 'lighting up' of a preexisting condition "is an injury in the occupation causing the same." (*Id.*, at 301, quoting *Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590]; see also *Zemke v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; *Reynolds Electrical & Engineering Co. v. Workers' Comp. Appeals Bd. (Buckner)* (1966) 65 Cal.2d 438 [31 Cal.Comp.Cases 421].) Thus, the issue here, is not whether work stress was the major cause of decedent's death, but whether it was a cause, i.e., a contributing factor.

For the reasons stated in the WCJ's report, we agree that the opinion of neurologic panel qualified medical examiner (PQME) Vincent Fortanasce, M.D., is substantial medical evidence upon which the WCJ properly relied. To be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416–17, 419 [33 Cal.Comp.Cases 660].) A physician's report must also be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Yeager Construction 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, 612 (Appeals Board en banc), 70 Cal.Comp.Cases 1506 (writ den.)) 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].)

Finally, we note that 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].)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

MARGUERITE SWEENEY, COMMISSIONER
CONCUR NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 4, 2022

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

**DAVID KIM
LAW OFFICE OF CARL KREIBICH
STRATMAN, SCHWARTZ & WILLIAMS-ABREGO**

PAG/pc

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**

INTRODUCTION

Date of Injury:	February 18, 2018
Age on DOI:	50
Occupation:	Executive Chef
Identity of Petitioner:	Defendant Employer
Timeliness:	The Petition Is Timely
Verification:	The Petition Is Verified
Date of Decision	January 10, 2022

Petitioner's Contentions

1. That the Worker's Compensation Judge acted in excess of his powers;
2. That the evidence does not justify the Findings of Fact;
3. That the Findings of Fact do not support the Order or Decision or Award

FACTS

Applicant, while employed on February 18, 2018 as an Executive Chef, at Encinitas, California, by Shoulda Been There dba Fat Fish aka Kai Ola, claims to have sustained injury arising out of and in the course of employment in the form of a stroke, causing compensable consequence injuries to the left side of the body, left upper extremity, left lower extremity, left hip, speech, psyche, cognition, sleep disorder, bowel/bladder.

The facts as established at trial are not in dispute. Applicant was at work during his normal work hours and was performing his job duties with a chef's knife in his hand when he noticed a heaviness in his hand and had to lie down. Applicant was taken to the hospital and diagnosed with a stroke. Therefore the injury clearly occurred during the course of employment (COE). The issue presented at trial concerns whether the injury also arose out of the employment (AOE).

To resolve this question, the parties proceeded to a Qualified Medical Evaluation with Dr. Vincent Fortansace in Neurology. Dr. Fortanasce issued reports on August 9, 2018, October 9, 2018, July 16, 2020, and March 11, 2021. These reports state that the stress of applicant's job was a contributing factor in causing applicant's stroke. Dr. Fortansace's deposition was taken on October 15, 2020. Dr. Fortansace requested an internist to address applicant's underlying hypertension. The parties then proceeded to a second PQME with Dr. Stanley Majcher in Internal Medicine. Dr. Majcher issued reports on May 3, 2019, April 27, 2020, and June 29, 2020 which concluded that applicant's stroke was due to

applicant's high blood pressure, and the doctor did not attribute this to be due to industrial factors.

On December 16, 2021 the case came to trial before the undersigned. After hearing applicant's testimony and reviewing the medical record, the WCJ found that the medical reporting, and applicant's credible testimony, support a finding that the stress at work was a contributing factor in causing an increase in applicant's high blood pressure and the resulting stroke of February 18, 2018. Defendant has filed a timely petition for reconsideration.

DISCUSSION

The essential argument in defendant's petition is that the QME reports of Dr. Fortanasce are defective because they were based upon an inadequate medical history. However, this argument obscures the primary issue that was properly addressed in the PQME reporting of Dr. Fortanasce: Whether the stress of applicant's employment duties were a contributing factor in causing applicant's stroke. This medical/legal issue has previously been discussed at length in numerous heart attack and stroke cases before the WCAB.

After hearing and considering applicant's credible testimony, the WCJ determined that he was subjected to a great degree of stress at work: Defendant's restaurant was smaller than where applicant had worked previously, so he had to take on additional duties and responsibilities. Applicant was always in the front of the restaurant where he worked behind a counter preparing food. This caused him to have to deal with customers' issues and complaints. Applicant was the first person you would see upon entering the restaurant. There was no hostess or cashier. Applicant had to deal with unhappy customers. Sometimes when the restaurant was busy, the food would take too long to get to the customers which caused him stress. Applicant stated he would feel anxious when he arrived at the restaurant each day.

This stress has been found by the Qualified Medical Examiner, Dr. Vincent Fortanasce to be a contributing factor in elevating applicant's blood pressure and a contributing factor in causing the resulting stroke. The opinions of this QME constituted the most substantial and well-reasoned explanation as to how the stroke arose out of applicant's employment:

JOINT EXHHIBIT 1:

Vincent M. Fortanasce, M.D 8/9/18

“It is within reasonable medical probability that on-the-job stress could have spiked his blood pressure to the point causing a stroke. Absenting any evidence to the contrary, whatever was going on at work at the time of the stroke, is what precipitated the stroke.”

JOINT EXHIBIT 3:

Vincent M. Fortanasce, M.D 7/16/20

“I reviewed the Panel Qualified Medical Evaluation reports of Stanley Majcher, M.D. with great interest. Dr. Majcher found that Mr Kim suffered a stroke as a result of failure to control the high blood pressure which had been present for a few years prior to the onset of the stroke in February 2018. I would agree with this. He (Dr. Majcher) did acknowledge that stress contributed to high blood pressure; however, did not find objective findings in the records to support stress in the workplace caused or contributed to the stroke.”

“After reviewing the medical records, I think it is important that the Panel Qualified Medical Examiner in Internal Medicine, Dr. Majcher states that stress contributes to high blood pressure. Once again, Mr. Kim had only worked for the above-noted employer for five months prior to his stroke; however, he worked as a General Manager/Head Sushi Chef for Shoulda Been There LLC, dba The Fat Fish where he would have to perform the duties of a lead chef, along with scheduling and managing daily operations. His supervisory position would be inherently stressful and, in my opinion, **was the coups de grace to the February 2018 stroke**. The stroke occurred while he was at work, and by virtue of the stroke happening at work, I find there is industrial causation but ultimately this would be deferred causation to the Trier of Fact.”

JOINT EXHIBIT 8:

Vincent M. Fortanasce, M.D 3/11/21

“After reviewing the newly submitted medical records, the psychological reporting of Dr. Noordeloos dated July 29, 2019, and the reporting of his primary treating neurologist Dr. Bahreman dated August 13, 2019, my opinion on the issue of causation would be unchanged. In fact these two physicians agree that **Mr. Kim had work-place stress that was a contributor to his hypertension and ultimately contributed to the February 2018 stroke**. Dr. Majcher, the Panel Qualified Medical Evaluation in internal medicine also acknowledge stress as contributing to hypertension. My previous determination on apportionment would be unaltered.”

QME Dr. Fortanasce has correctly stated that the trier of fact must determine whether or not applicant’s job duties were stressful. After hearing and considering applicant’s un rebutted and credible testimony, the WCJ concluded that applicant’s job was extremely stressful, and had been so for some time. Therefore, pursuant to the conclusions of Dr. Fortanasce, the work stress was found to be a contributing factor in causing applicant’s stroke. Previous cases have long held that applicant’s employment need not be the primary or substantial factor in causing a work injury. It is only necessary that the employment be a *contributing* factor. The WCJ finds that applicant’s work stress

was real, and was a contributing factor in causing his stroke while at work on February 18, 2018. Therefore, the injury was found to be industrial.

RECOMMENDATION

It is recommended that reconsideration be denied.

DATED: 02/04/2022

ANDREW J SHORENSTEIN

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE