WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL SNOWDEN, *Applicant*

vs.

CITY OF LOS ANGELES, PERMISSIBLY SELF-INSURED; ADMINISTERED BY TRI-STAR RISK MANAGEMENT, *Defendants*

Adjudication Number: ADJ11027260
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration (Petition). Having completed our review, we now issue our Decision After Reconsideration.

Defendant City of Los Angeles (defendant) seeks reconsideration of the April 19, 2021 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a police officer from April 1, 1997 through August 17, 2017, sustained industrial injury to the brain, circulatory system (heart) and neurological system (stroke). The WCJ found the presumption of industrial causation of Labor Code section 3212.5 applicable, and that defendant had not successfully rebutted the presumption.[1]

Defendant contends that applicant's congenital patent foramen ovale and his personal travel were the sole cause of his injury, thus rebutting the presumption of section 3212.5. (Petition, at 6:20.)

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

[1] All further statutory references are to the Labor Code unless otherwise stated.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&O.

FACTS

Applicant claimed injury to the brain, circulatory system (heart) and neurological system (stroke) while employed from April 1, 1997 to August 17, 2017 as a police officer at Los Angeles, California. Defendant has denied liability for the claim.

On August 17, 2017, applicant sustained a cerebrovascular accident while visiting his brother in Colorado. Applicant awoke one morning experiencing symptoms of stroke, including hemispheric paralysis and an inability to ambulate. Applicant sought emergency medical care from a hospital in Colorado Springs, where he underwent diagnostic studies and was diagnosed with bleeding in the brain and atrial fibrillation. Applicant underwent a procedure to relieve intracranial pressure, followed by nearly two months of rehabilitation therapy. (Ex. AA, report of AME Mark Hyman, M.D., dated December 11, 2017, p.3.) Applicant returned to Los Angeles on October 10, 2015, where he continued to receive rehabilitation therapy.

On September 12, 2017, applicant filed an Application for Adjudication of Claim asserting injury to the circulatory system (heart) and neurological system (stroke). Defendant initially admitted injury. (Ex. 1, Acceptance Letter, dated February 15, 2018.) The parties selected three Agreed Medical Examiners (AMEs): Mark Hyman, M.D. in internal medicine, Robert Shorr, M.D. in neurology, and Elsie Chang, Ph.D. in neuropsychology.

Neurology AME Robert Shorr, M.D. opined in his initial report that applicant's stroke "would be considered AOE/COE based on the cardiac presumption as the stroke is most likely the result of atrial fibrillation." (Ex. OO, report of AME Robert Shorr, M.D., dated November 21, 2017, at p.30.)

Internal Medicine AME Mark Hyman, M.D. deferred his opinion on causation following a November 15, 2018 examination of applicant, pending additional record review. (Ex. AA, report of AME Mark Hyman, M.D., December 11, 2017, p.9.) After receipt of additional records, Dr. Hyman reported that applicant suffered from a "patent foramen ovale" (PFO), along with a genetic mutation, and a "prothrombin disorder." (Ex. BB, report of AME Mark Hyman, M.D., dated November 15, 2018, at p.2.) Dr. Hyman observed that applicant's post-stroke rehabilitation

was complicated by deep vein thrombosis in the left lower extremity, a possible second stroke, and bilateral pulmonary embolization. (*Ibid*.) In a December 3, 2018 supplemental report following record review, Dr. Hyman noted that a PFO is a congenital opening in the heart that might allow "clots from the venous circulation to cross over and cause a stroke." (Ex. CC, report of AME Mark Hyman, M.D., dated December 3, 2018, at p.2.) Dr. Hyman also opined that while atrial fibrillation was observed at the time of applicant's stroke, and that longstanding atrial fibrillation can be a source of clotting, the atrial fibrillation was most likely a result of medications administered during the course of emergency treatment. Applicant also experienced blood clots in the lower extremities during his rehabilitation, which Dr. Hyman attributed to a genetic tendency to "clot in his legs." (*Ibid.)* Dr. Hyman stated this "could have occurred with his travels to Colorado due to airplanes or prolonged sitting," or that it was possible that he developed the clotting while in the hospital "due to the sedentary nature of the stroke." (*Ibid*.) Summarizing his findings, Dr. Hyman opined:

> [I]n analyzing these extensive records and noting the multiple inconsistencies in the reporting, the most probable cause of this gentleman's stroke was genetic in nature. He had traveled and most probably had developed some clotting in his legs. He was at risk for this based on his genetic tendencies of prothrombin gene and Factor V Leiden abnormalities. Because he had a previously undiagnosed congenital patent foramen ovale, one of these clots crossed over into the cerebral circulation and caused the stroke. This gentleman's unfortunate medical condition would not be industrially related. (*Id*. at p.3.)

Neurology AME Dr. Shorr indicated in a July 19, 2019 report that notwithstanding Dr. Hyman's causation analysis, Dr. Shorr continued to feel that the atrial fibrillations documented contemporaneously with applicant's initial cerebrovascular event warranted the presumption of industrial causation. (Ex. PP, report of AME Robert Shorr, M.D., dated July 19, 2019, at p.10.)

On December 10, 2019, the parties undertook the deposition of Dr. Hyman, who testified that if the applicant did not have a PFO, he would not have suffered the stroke. (Ex. KK, transcript of the deposition of Mark Hyman, M.D., dated December 10, 2019, at 7:8.) Dr. Hyman agreed that applicant's PFO is a form of heart trouble, and that to the doctor's knowledge, applicant was unaware of the PFO until it manifested following the stroke. (*Id.* at 7:13.)

On April 28, 2020, neurology AME Dr. Shorr reevaluated applicant. Dr. Shorr again opined that there were multiple potential underlying causes for the stroke, including deep vein thrombosis with embolization, possible movement of the clot through the PFO to the brain, and atrial fibrillation. Dr. Shorr opined:

> In my opinion, the stroke is much more likely due to the atrial fibrillation than the other factors in the case. The claimant has documented atrial fib and is being treated with Eliquis. Perhaps a watchman procedure (basically closing off of the atrial appendage) should have been considered when he had his PFC procedure because atrial fibrillation is a much more common cause of stroke than embolization via PFO. Since the causative problem of his stroke is atrial fibrillation, I believe that he should be considered to have a presumption of AOE/COE based on being a sworn police officer. (Ex. RR, report of AME Robert Shorr, M.D., dated April 28, 2020, at p.17.)

On July 23, 2020, defendant denied liability for the claim based on the reporting of Dr. Hyman.

In a report dated September 9, 2020, Dr. Hyman deferred the determination as to "whether or not this gentleman's PFO fulfills the legal criteria of heart trouble in public safety personnel." (Ex. II, report of internal AME Mark Hyman, M.D., dated September 9, 2020, at p.2.) In a supplemental report of September 22, 2020, Dr. Hyman reiterated that "the contemporaneous non-work related event was this gentleman's congenital patent foramen ovale and his personal travel which would be the sole cause of his injury." (Ex. JJ, report of AME Mark Hyman, M.D., dated September 22, 2020, at p.2.)

The parties appeared at trial on April 7, 2021, and raised the issues of injury AOE/COE, and whether the presumption of section 3212.5 applied.

The WCJ issued her F&O on April 19, 2021. The WCJ found that applicant's PFO first manifested during applicant's qualified employment, and that Dr. Shorr had opined that the injury was caused by atrial fibrillation. (F&O, Opinion on Decision, p.2.) Accordingly, the WCJ found that the presumption of section 3212.5 applied, and that applicant had sustained injury AOE/COE to the brain, circulatory system (heart) and neurological system (stroke). (F&O, Findings of Fact, Nos. 1 and 3.)

DISCUSSION

Defendant contends that because a nonwork-related event was the sole cause of applicant's heart trouble, the defendant has successfully rebutted the presumptions of section 3212.5 (Petition, at 6:18.)

Section 3212.5 creates a rebuttable presumption of industrial causation in favor of certain public safety employees, including police officers such as applicant herein. This provision states that an injury to the heart that develops or manifests itself during employment is presumed to be

industrial, unless controverted by other evidence. However, such rebuttal cannot be "attributed to any disease existing prior to such development or manifestation."

Section 3212.5 provides, in relevant part:

> In the case of a member of a police department of a city or municipality…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…is in the service of the police department…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.
>
> Such heart trouble or pneumonia so developing or manifesting itself 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.
>
> Such heart trouble or pneumonia so developing or manifesting itself in such cases shall in no case be attributed to any disease existing prior to such development or manifestation.

In enacting the presumption, the legislature sought to avoid the so-called "battle of the experts" in cases involving safety officers who had sustained "heart trouble" as a result of their occupation:

> [T]he Legislature adopted the 1959 amendment at issue here because the case-by-case process of adjudicating the preexisting disease issue had proven incapable of producing fair and consistent results. To remedy that situation, the Legislature determined, as a matter of public policy, that in all cases the medical doubt should be resolved in the disabled employees' favor and that employers should be precluded from defeating compensation by relying on evidence of preexisting disease. (*San Francisco v. Workers' Comp. Appeals Bd. (Wiebe)* (1978) 22 Cal. 3d 103, 116-117 [43 Cal.Comp.Cases 984].)

We note that Dr. Hyman and Dr. Shorr, both AMEs in the present case, have markedly differing opinions regarding causation of applicant's stroke, similar to the situation described in *Wiebe*, *supra*. The question of whether applicant qualified for the presumption of section 3212.5 was raised at trial and the WCJ determined that section 3212.5 was applicable to the claimed injury. (F&O, Finding of Fact No.3.) The finding is not challenged in the instant Petition for

Reconsideration.[2] Our analysis now turns to whether the presumption of industrial causation has been rebutted.

The heart trouble presumption is a presumption affecting the burden of proof and is rebuttable. (*Reeves v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 22, 30 [65 Cal.Comp.Cases 359].) The presumption "imposes the burden on the employer to prove that applicant's heart trouble did not arise out of and in the course of his employment." (*Ibid*.) The burden may be carried "by proving that some contemporaneous nonwork-related event -- for example, a victim's strenuous recreational exertion -- was the sole cause of the [industrial injury]." (*Wiebe*, *supra*, 22 Cal. 3d 103, at 112.)

In *Jackson v. Workers' Comp. Appeals Bd.*, 133 Cal. App. 4th 965, 972 [70 Cal.Comp.Cases 1413], applicant contracted a viral respiratory illness that resulted in myocarditis resulting in a fatal heart attack. The parties introduced medical reporting with differing opinions as to causation. The WCJ held that the presumption of section 3212.5 attached, and that defendant had not overcome the presumption. The WCAB granted defendant's Petition for Reconsideration, holding that "the medical evidence that the cause of death was 'the non-industrial viral infection that led to the development of the myocarditis' constituted sufficient evidence 'to rebut the presumption of industrial causation.'" (*Jackson*, *supra*, at 972.) The Court of Appeal, reversing the decision of the WCAB, explained the burden of proof necessary to rebut the presumption:

> The heart trouble presumption for some public safety workers contains what is called an "anti-attribution clause." For example, in Labor Code section 3212.5 (which is applicable to police officers and highway patrol members), the anti-attribution clause further qualifies the heart trouble presumption: "Such heart trouble…so developing or manifesting itself in such cases shall in no case be attributed to any disease existing prior to such development or manifestation." Examining the effect of section 3212.5, the appellate court in *Parish v. Workers' Comp. Appeals Bd.* (1989) 210 Cal. App. 3d 92, 98 [258 Cal. Rptr. 287], concluded it was the employer's burden to show "what '…contemporaneous nonwork-related event…,' if any, was the sole cause of applicant's heart trouble." Stated another way, the presumption "'does not guarantee [covered] employees that they will recover workers' compensation benefits for a heart attack which occurs during the course of their employment, but leaves the employer free to rebut the statutory presumption by proving that some contemporaneous nonwork-related event—for example, a victim's strenuous

[2] Defendant's Petition for Reconsideration states "[t]here is no dispute that applicant qualifies for heart presumption in that he was employed as a police officer for five years prior to his heart trouble manifesting itself." (Petition for Reconsideration at 5:13.)

> recreational exertion—was the sole cause of the heart attack.' [Citation.] That is, an employer may rebut the presumption, but only with proof of causation by a nonindustrial event occurring at the same time as the heart trouble developed or manifested itself." (*Jackson,* supra, at 970.)

The *Jackson* decision went on to explain that defendant's burden is affirmative, and that "simply pointing out that there is nothing specific about his job that caused his heart attack or put him at a greater risk for this condition does not satisfy [defendant's] burden to prove that a contemporaneous non-work-related event was the sole cause of the [injury] in question." (*Jackson*, *supra*, at 972.)

Thus, the *affirmative* burden to be carried by defendant in rebutting the presumption of industrial causation is to establish that some contemporaneous, nonwork-related event was the sole cause of applicant's heart trouble. Here, the WCJ determined that defendant did not meet this burden. We agree.

We observe initially that the causation of the stroke as described by Dr. Hyman did not arise *solely* out of a contemporaneous nonwork-related event. Dr. Hyman opined that applicant's genetic predisposition toward clotting resulted in the formation of blood clots in the legs, possibly developing during applicant's flight to Colorado. The clots would have then circulated to the heart and passed through the PFO to the cerebral arteries, causing the stroke and cerebral hemorrhage. (Ex. CC, report of AME Mark Hyman, M.D., dated December 3, 2018, at p.2.) However, Dr. Hyman's formulation requires the convergence of multiple separate causative factors: (1) a genetic predisposition toward developing blood clots, (2) development of the blood clots while sitting during air travel or other sedentary activity, and (3) the existence of, and passage of the blood clot through, a PFO. The record does not establish that any of these factors, standing alone, would have resulted in the stroke. Rather, it was the convergence of presumptively industrial and nonindustrial factors which resulted in applicant's cerebrovascular injury. Accordingly, a nonwork-related factor is not *solely* responsible for the injury.

Additionally, the two factors cited by Dr. Hyman of genetic predisposition and development of the blood clot during air travel still would not have resulted in the stroke absent the existence of a PFO, which manifested for the first time contemporaneously with the injury. Dr. Hyman's deposition testimony confirmed that applicant's stroke would not have occurred absent the existence of the PFO. (Ex. KK, transcript of the deposition of Mark Hyman, M.D., dated December 10, 2019, at 7:8.) Dr. Hyman further confirmed that, to his knowledge, the first time the

applicant became aware of the PFO (i.e. when the PFO manifested) was shortly after the stroke in question, an assertion that is unchallenged in the present evidentiary record. (*Id.* at 7:13.) Because the PFO itself is presumptively industrial, the presumption may not be overcome by identifying nonindustrial factors that could not result in injury without the presumptively industrial PFO itself. (*Simmons v. County of Riverside*, 2016 Cal. Wrk. Comp. P.D. LEXIS 442 (Appeals Bd. panel decision)[a combination of preexisting hypertension and newly manifesting cardiomyopathy is not a 'sole cause' of heart trouble].)

We note further the opinion of AME Dr. Shorr, who attributes causation to atrial fibrillation, rather than to a blood clot transiting the PFO. Dr. Shorr observes that applicant had documented atrial fibrillation at the time of the stroke, a condition that is "a much more common cause of stroke than embolization via PFO." (Ex. RR, report of neurology AME Robert Shorr, M.D., dated April 28, 2020, at p.17.) The agreed medical examiner has been chosen by the parties because of his expertise and neutrality, and the AME's opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal. App. 3d 775, 782 [51 Cal. Comp. Cases 114].) Moreover, the Workers' Compensation Appeals Board is empowered to resolve conflicts in the evidence. (*Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal. 3d 312, 317 [35 Cal. Comp. Cases 500].)

Here, Dr. Hyman appropriately deferred the finding of whether the injury was presumed compensable to the WCJ. The WCJ found that the presumption applied, and entered a finding of injury AOE/COE relying in part on the unrebutted presumption of section 3212.5, and in part on the persuasive opinion of neurology AME Dr. Shorr. On the present record, we discern no good cause to disturb those findings. Accordingly, we will affirm the F&O.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 19, 2021 Findings and Order is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 4, 2022

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

MICHAEL SNOWDEN
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE
OFFICE OF THE CITY ATTORNEY (LOS ANGELES)

SAR/abs

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