WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DAVID GASKA (deceased), JOAN GASKA, ERICA GRAY, and GAVIN NEIL BELCHER, ***Applicants***

vs.

SEARLES VALLEY MINERALS; XL SPECIALTY INSURANCE, administered by TRISTAR RISK MANAGEMENT, ***Defendants***

Adjudication Number: ADJ14258730
Bakersfield District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the "Rulings and Findings of Fact" (FF) issued by a workers' compensation administrative law judge (WCJ) on July 28, 2023, wherein the WCJ found in pertinent part that the decedent David Gaska sustained injury in the form of Covid-19 while employed by defendant as a buyer on December 4, 2020, resulting in his death on January 8, 2021.

Defendant contends that the decedent's injury did not arise out of employment and did not occur during the course of employment (AOE/COE).

We have received an Answer from the applicant dependents.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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 grant the Petition for Reconsideration, rescind the FF, and return this matter to the WCJ for further proceedings. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

FACTS

Applicants claimed that decedent David Gaska sustained industrial injury in the form of Covid-19 while working for defendant as a buyer on December 4, 2020, resulting in his death on January 8, 2021.

On March 20, 2022, the Qualified Medical Evaluator (QME) with a specialty in internal medicine, Dr. Gary Zagelbaum, issued a report. He concluded that:

> If it can be confirmed and substantiated that Mr. Gaska's job created environmental conditions which causally contributed to his encountering exposure to the coronavirus which resulted in his developing COVID-19 infection in early December 2020 and contributed to his pre-existing long-term liver disease and triggered hospitalization several days later, then his death would be (at least 1%) work-related.

(Ex. 5, Report of Dr. Zagelbaum dated 3/20/22, p. 97.)

The parties proceeded to trial on April 25, 2023. The sole issue at trial was injury AOE/COE. The following witnesses testified in pertinent part as follows:

Gaska's fiancée, Erica Gray, stated that Gaska contracted Covid-19 in 2020; he first had symptoms on December 4, and tested positive for Covid-19 on December 8, 2020. (4/25/23 Minutes of Hearing/Summary of Evidence (MOH/SOE), p. 4.) Gaska received medical help at the hospital on December 11, 2020, and eventually passed away on January 8, 2021. (MOH/SOE, pp. 4-5.) According to Gray, Gaska worked with four other people in his department. (MOH/SOE, p. 4.) Gray stated that Gaska's co-worker Connie was at the hospital being tested for Covid-19 on the first day that Gaska went to the hospital. (MOH/SOE, p. 4.) Gray also stated that Gaska's co-worker Ruth and her husband were also sick as well as two other people in their office. (MOH/SOE, p. 4.)

Gaska's supervisor, Tom Perkins, stated that the purchasing department worked in a triple wide mobile home with six separate offices, a central area, and a conference room. (MOH/SOE, p. 6.) This department was in a separate building that was 200 feet away from any other building. (MOH/SOE, p. 6.) Perkins also stated that Gaska was the first person to become symptomatic with Covid-19 in their department. (MOH/SOE, p. 6.) Perkins himself got Covid-19, was symptomatic on December 10, 2020, and was hospitalized. (MOH/SOE, p. 6.) Perkin's girlfriend tested positive December 7, 2020. (MOH/SOE, p. 7.) Another employee, Ruth Bryant, called in sick on December 7, 2020. (MOH/SOE, p. 7.)

John Bradley, the manager of safety, security, and emergency services, stated that he was in charge of the investigation surrounding Gaska's infection, but never was able to determine where Gaska contracted Covid-19. (MOH/SOE, pp. 7-8.) He estimated that there were six or seven Covid-19 infections in the purchasing department and that no employees contracted Covid-19 in other departments in December 2020. (MOH/SOE, p. 8.) He believed that in December 2020, 100 percent of the infections were in the procurement department. (MOH/SOE, pp. 8-9.)

At the conclusion of the trial, the WCJ found that decedent Gaska sustained a fatal injury arising out of and in the course of his employment in the form of contracting Covid-19 on or about December 4, 2020, at Trona California, while employed as a Buyer by Defendant-Employer Searles Valley Materials resulting in his death on January 8, 2021. (Rulings and Findings of Fact, Finding of Fact #1.)

DISCUSSION

The employee bears the burden of proving the injury arose out of and in the course of employment by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.)[1] Whether an employee's injury arose out of and in the course of employment is generally a question of fact to be determined in light of the particular circumstances of the case. (*Wright v. Beverly Fabrics* (2002) 95 Cal.App.4th 346, 353 [67 Cal.Comp.Cases 51].) The phrase "in the course of employment" "'ordinarily refers to the time, place, and circumstances under which the injury occurs.'" (*Latourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [63 Cal.Comp.Cases 253], citing *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 733.) An "employee is in the 'course of his employment' when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do." (*Latourette, supra*, at p. 651.) For the injury to arise out of employment, it must " 'occur by reason of a condition or incident of [the] employment.' [citation] That is, the employment and the injury must be linked in some causal fashion. [citation]" (*Id.* at p. 651.)

A WCJ's decision must be supported by substantial evidence in light of the entire record. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39

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

Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. 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, 620-621 (Appeals Bd. en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Medical evidence that industrial causation was reasonably probable, although not certain, constitutes substantial evidence for a finding of injury AOE/COE. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660].) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Worker's Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

On the other hand, there must be some solid basis in the medical report for the doctor's ultimate opinion; the Appeals Board may not blindly accept a medical opinion which lacks a solid underlying basis, and must carefully judge its weight and credibility. (*National Convenience Stores v. Workers' Comp. Appeals Bd.* (*Kesser*) (1981) 121 Cal.App.3d 420, 426 [46 Cal.Comp.Cases 783].) In other words, the Appeals Board must look to the underlying facts of a medical opinion to determine whether or not that opinion constitutes substantial evidence, and accordingly, the expert's opinion is no better than the facts on which it is based. (*Turner v. Workers' Comp. Appeals Bd.* (1974) 42 Cal.App.3d 1036, 1044 [39 Cal.Comp.Cases 780].)

The issue we face in the instant case is whether substantial evidence supports the finding that Gaska sustained injury AOE/COE. On the record before us, substantial evidence does not support the finding that the injury occurred AOE/COE. QME Dr. Zagelbaum concluded that "**If** it can be confirmed and substantiated that Mr. Gaska's job created environmental conditions which causally contributed to his encountering exposure to the coronavirus which resulted in his developing COVID-19 infection in early December 2020 and contributed to his pre-existing long-term liver disease and triggered hospitalization several days later, **then** his death would be (at least 1%) work-related." (Ex. 5, p. 97, emphasis added.) However, Dr. Zagelbaum did not make any conclusion as to how likely it was that his job created environmental conditions which causally contributed to his encountering exposure to Covid-19. This conclusion does not support a finding of AOE/COE as it is based on surmise, speculation, conjecture or guess. (See *Hegglin v. Workmen's Comp. Appeals Bd*., *supra*, 4 Cal.3d at p. 169.)

Further, John Bradley, the manager of safety, security, and emergency services, stated that he was in charge of the investigation surrounding Gaska's infection but never was able to determine where Gaska contracted Covid-19. (MOH/SOE, pp. 7-8.)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *Nunes (Grace) v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 752; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers' Comp. Appeals Bd., TLG Med. Prods.* (2005) 70 Cal.Comp.Cases 797, 802.) The Appeals Board has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403.)

Sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141-143 (Appeals Bd. en banc).) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd*., *supra*, 79 Cal.App.4th at p. 404.)

When the record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. L.A. County Metro. Transit Authority*, *supra*, 67 Cal.Comp.Cases at p. 142.) If the

supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, the selection of an agreed medical evaluator (AME) by the parties should be considered, or alternatively, the WCJ may appoint a regular physician. (*Id*.) Therefore, upon return to the WCJ, we recommend that the medical record be further developed.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the July 28, 2023 Rulings and Findings of Fact is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the July 28, 2023 Rulings and Findings of Fact is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 13, 2023

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

JOAN GASKA
ERICA GRAY
GAVIN NEIL BELCHER
CHAIN COHN CLARK
LAW OFFICE OF PATRICK J. BRAULT

JMR/*ara*

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