WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ELSA GARCIA, JOFFRE GARCIA (Deceased), ***Applicant***

vs.

U.S. BANK;
OLD REPUBLIC, ***Defendants***

Adjudication Number: ADJ14627934
Anaheim District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the January 27, 2023 Findings of Fact. The workers' compensation administrative law judge (WCJ) found that defendant failed to rebut the presumption that applicant contracted COVID-19 on an industrial basis and found that Mr. Garcia sustained an injury arising out of employment in the form of COVID-19.

Defendant contends that the WCJ incorrectly found that this is a presumptive injury case because there was no "outbreak" at the time applicant contracted COVID-19. Defendant further contends that without the presumption, applicant did not meet their burden of proof that applicant contracted COVID-19 at work.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that the petition be denied. We have reviewed the record in this matter. For the reasons discussed below, we will grant the petition for reconsideration, and as our decision after reconsideration, we will rescind the January 27, 2023 Findings and Order and return this matter to the trial level for further proceedings and a new decision.

FACTS

The essential facts are not in dispute. Mr. Garcia was employed as a banker by U.S. Bank at the Signal Hill branch. He last worked at that location on November 16, 2020. Mr. Garcia tested positive for COVID-19 on November 19, 2020. He died on November 26, 2020. The cause of death listed on his death certificate is COVID-19. (Exh. 1, January 21, 2021, County of Los Angeles, Death Certificate.)

There were approximately five people working at the Signal Hill branch in November of 2020. Applicant's co-worker Ms. Pinto also tested positive for COVID-19 on November 19, 2020. (Exh X. Undated, US Bank Covid Results.)

Mr. Garcia's widow, Elsa Garcia, filed an application for adjudication of a death claim on April 5, 2021. Defendant denied the claim. Defendant filed a declaration of readiness to proceed (DOR) to a mandatory settlement conference (MSC) on the issue of AOE/COE on August 27, 2021. On August 31, 2021, applicant objected to the DOR. In the objection, applicant noted that the parties have not yet obtained a medical-legal evaluation. At a MSC on September 13, 2021, the matter was taken off calendar.

Defendant filed a second DOR to an MSC on the issue of AOE/COE on November 10, 2021. Applicant's attorney filed an objection December 16, 2021, noting that there was a pending panel qualified medical evaluation (PQME) with Dr. Hendel. At an MSC on December 20, 2021, the WCJ set the matter for trial. The MSC WCJ noted that applicant's objection to the DOR was untimely and deferred the issue of the admissibility of any PQME report to the trial judge. (December 20, 2021 Minutes of Hearing, p. 1.)

After a series of discovery disputes related to documents that applicant attempted to obtain from the employer to provide to the PQME, the matter proceeded to trial without medical-legal evidence.

On January 27, 2023, the WCJ issued the Findings of Fact that is the subject of defendant's petition for reconsideration.

ANALYSIS

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 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].)

To be compensable, an injury must arise out of and occur in the course of employment. (Lab. Code, § 3600.[1]) The employee bears the burden of proving injury AOE/COE 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.) 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].)

In cases where there is a statutory presumption that an injury is industrial, it is defendant's burden to rebut the presumption. However, based on the record before us, defendant is correct that the presumptions found in Sections 3212.87 and 3212.88 do not apply in this case.

Mr. Garcia was employed as a banker, which is not one of the public safety occupations entitled to the presumption under Section 3212.87. Section 3212.88, which applies to all other employees, became effective September 17, 2020, and defines injury as including "illness or death resulting from COVID-19" if all of the following circumstances apply:

> (1) The employee tests positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction.
> (2) The day referenced in paragraph (1) on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after July 6, 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 prior to the positive test.

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

> (3) The employee's positive test occurred during a period of an outbreak at the employee's specific place of employment. (Lab Code, § 3212.88(b)(1)-(3).)

In this case, while the employee met the first two conditions (i.e., he tested positive within 14 days of performing work at a place of employment and the positive test occurred after July 6, 2020), there does not appear to be evidence that the "employee's positive test occurred during a period of an outbreak at the employee's specific place of employment" as required by Section 3212.88(b)(1).

Section 3212.88(m)(4) defines an outbreak as follows:

> An "outbreak" exists if within 14 calendar days one of the following occurs at a specific place of employment:
>
> (A) If the employer has 100 employees or fewer at a specific place of employment, 4 employees test positive for COVID-19.
> (B) If the employer has more than 100 employees at a specific place of employment, 4 percent of the number of employees who reported to the specific place of employment test positive for COVID-19.
> (C) A specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a community college district chancellor, school president, or school superintendent due to a risk of infection with COVID-19.

Here, it is undisputed that Mr. Garcia's employer had fewer than 100 employees in November of 2020 and that two employees tested positive for COVID-19 during the relevant 14-day period. In addition, although applicant's place of employment was closed after he and a co-worker tested positive for COVID-19, there is no evidence that it was "ordered to close" as required by subsection (C). Based on our review of the record, there is insufficient evidence to find that Mr. Garcia contracted COVID-19 during an outbreak and therefore the Section 3212.88 presumption does not apply. Therefore, we must return this case to the trial level for the WCJ to determine the issue of industrial causation without the presumption.

We next turn to the question of whether, in the absence of the presumption, the WCJ can properly find that applicant sustained (or did not sustain) an industrial injury without medical evidence that addresses the issue of causation. For the reasons discussed below, this case requires medical evidence.

Cases involving the issue of industrial causation "may run a gamut from the blatantly obvious to the scientifically obscure." (*Peter Kiewit Sons v. Industrial Acci. Com.* (1965) 234 Cal. App. 2d 831, 839 [30 Cal. Comp. Cases 188] (*Kiewit*).) For instance, "[i]f a painter falls to the ground as a result of a scaffold collapse, breaking his leg, common sense dispenses with medical evidence of causation." (*Ibid.*) "[I]t has been held that testimony by a lay witness is proper to show the immediate consequences of an injury received by him (citations)...and the nature of the injuries received (citations)." (*Liberty Mut. Ins. Co. v. Industrial Acci. Com.* (1948) 33 Cal. 2d 89, 96-97 [13 Cal. Comp. Cases 267].) It has long been recognized that medical proof is required when issues of diagnosis, prognosis, and treatment are beyond the bounds of ordinary knowledge. (*City & County of San Francisco v. Industrial Acc. Com.* (*Murdock*) (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].)

In cases where an applicant's injury is caused by a communicable disease, the essential questions of when and where applicant contracted the disease may be unanswerable with any certainty. Medical evidence is required to establish industrial causation by demonstrating that it is more likely applicant acquired the disease at work or that the employment subjected the employee to a special risk of exposure in excess of that of the general population. (*Bethlehem Steel Co. v. Industrial Acc. Com*. (1943) 21 Cal.2d 742 [8 Cal.Comp.Cases 61].) It is a medical expert's job to assess whether it is medically probable that disease transmission occurred at work. The opinions of qualified physicians are entitled to consideration "since it is part of their vocation to observe diseases and how they spread and to draw conclusions from those observations." (*Pacific Employers Ins. Co. v. Industrial Acc. Com. (Ehrhardt)* (1942) 19 Cal.2d 622, 629 quoting *San Francisco v. Industrial Acc. Com. (Slattery)* (1920) 183 Cal. 273, 284.)

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; *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 [62 Cal.Comp.Cases 924].) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264].)

Here, a determination of AOE/COE must be based on substantial medical evidence and a medical-legal evaluation has not been completed. Therefore, we will return this matter to the trial level for the parties to complete the PQME process and for the WCJ to hold further proceedings and issue a new decision based on substantial evidence.

For the foregoing reasons,

IT IS ORDERED that defendant's petition for reconsideration of the January 27, 2023 Findings of Fact is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration that the January 27, 2023 Findings of Fact is **RESCINDED,** and the matter is **RETURNED** to the trial level for further proceedings and a new decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 21, 2023

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

ELSA GARCIA
SILBERMAN & LAM, LLP
HANNA, BROPHY, MacLEAN, McALEER & JENSEN, LLP

MWH/JB/mc

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