

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

ALBERTO RUBIO, *Applicant*

vs.

**GENERAL MOTORS, Permissibly Self-Insured, Administered by SEDGWICK CLAIMS
MANAGEMENT SERVICES, *Defendants***

**Adjudication Numbers: ADJ10202584, ADJ8686996
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award Re: Death Benefits of May 28, 2024, in which the Workers' Compensation Administrative Law Judge ("WCJ") found that the decedent, Alberto Rubio, while employed by General Motors as a warehouseman during the period January 19, 1976 through November 19, 2012, sustained injury arising out of and in the course of employment ("industrial injury") to his lumbar spine, neck, bilateral shoulders, thoracic spine, bilateral upper extremities, bilateral knees, bilateral hands, sleep disorder, and psyche. In addition, the WCJ found that "there was an Amended Joint Findings and Award of May 19, 2023, regarding accrued *inter vivos* benefits, which is now final," and that industrial anxiety and depression were a contributing cause of the cardiopulmonary arrest that caused the decedent's death on March 3, 2020. The WCJ also found that Maria Del Socorro Rubio was a total dependent of the decedent, that Ms. Rubio is entitled to death benefits in the amount of \$250,000.00, payable at the temporary disability rate of \$1,174.40 per week, less a reasonable attorney's fee of \$37,500.00 for her attorney, Dennis J. Hershewe, and that the decedent's family incurred reasonable burial expenses exceeding the maximum allowable sum of \$10,000.00, less a reasonable attorney's fee of \$1,500.00 for Mr. Hershewe.

Defendant contends that the WCJ's current Findings do not support the current Award because in the Amended Joint Findings and Award of May 19, 2023, there was no finding of

industrial injury to the decedent's heart, cardiovascular system, hypertension or coronary artery disease. Defendant further contends that this case is factually distinguishable from *South Coast Framing v. Workers' Comp. Appeals. Bd.* (2015) 61 Cal.4th 291 [80 Cal.Comp.Cases 489], and that the WCJ erred in relying upon medical evidence that is speculative, circumstantial, and based upon an inadequate history. Defendant also contends that the WCJ did not fairly consider the entirety of Dr. Lamm's report of August 22, 2023, that Dr. Lamm only provided conclusions without reasons for relying upon Dr. Pietruszka's medical opinion, and that the WCJ erred in relying upon a medical report obtained pursuant to Labor Code section 4605.

Applicant filed an answer.

We have considered the allegations of defendant's Petition for Reconsideration and the contents of the WCJ's Report and Recommendation ("Report") with respect thereto. Based on our review of the record, and for the reasons stated below and in said Report, which we adopt and incorporate as set forth in the attachment to this opinion, we will deny reconsideration.¹

We further note that in his report of July 28, 2021, Dr. Pietruszka opined in relevant part:

Mr. Alberto Rubio died of an acute cardiopulmonary arrest on March 3, 2020. The death certificate dated March 20, 2020, signed by Dr. Pooya Mobasserri on March 11, 2020, lists the primary cause of death as acute cardiopulmonary arrest and the secondary cause of death as malignant neoplasm of the liver. Hypertension is listed as a contributing cause. During the course of his work at General Motors Company, Mr. Rubio suffered various musculoskeletal injuries, primarily involving the cervical and lumbar spine. He developed a chronic pain disorder, which originated from discopathic disease for which he required extensive physical therapy treatment. He required both non-steroidal and opiate analgesics to control his pain. His lumbar pathology was further compromised by the presence of spinal stenosis, which caused his pain to be relentless. In addition to his various musculoskeletal problems, he later developed hepatic adenocarcinoma for which he required a liver transplant. His overall condition was further compromised by the presence of severe psychological stress and depression related to his musculoskeletal injuries and chronic pain syndrome. He was treated by Dr. Marcia Lamm for his psychological conditions. Psychological stress and negative emotions can precipitate sudden death. Psychological stress can trigger ventricular arrhythmias. The mechanisms by which psychological stress and arrhythmias occur include autonomic changes which alter repolarization. It is also understood that

¹ Commissioner Deidra E. Lowe signed the Appeals Board's prior decision in this matter, i.e., the Opinion and Decision After Reconsideration dated April 6, 2022. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

psychological stress can affect sympathetic denervation. [...] It is the general understanding of the medical community that psychological stress can make the heart more susceptible to suffer a disorganized rhythm. This links the effect of psychological stress to sudden death.

...

In addition to Mr. Rubio's chronic pain disorder, psychological conditions and his lead exposure, Mr. Rubio had a diagnosis of obstructive sleep apnea, a condition that is known to cause death due to respiratory arrest and cardiac arrhythmia. [...] Psychological stress is known to cause an increase in body weight. Obstructive sleep apnea is a condition that is associated with obesity and increased body weight. Other associated comorbidities include arrhythmias such as atrial fibrillation, pulmonary hypertension, congestive heart failure and depression. Mr. Rubio had a diagnosis of atrial fibrillation. Dr. Mobasserri also listed hypertension as one of Mr. Rubio's diagnoses. Patients with cardiovascular disease have a high prevalence for obstructive sleep apnea. This would include patients with coronary artery disease, arrhythmias and hypertension.

In considering Mr. Rubios's diagnosis of acute cardiopulmonary arrest, it is important to understand that this condition can arise from many different causes. This may include primary myocardial disease, pulmonary disease, electrolyte imbalance, metabolic disorders such as metabolic acidosis and other less common causes such as infections. In this case, we deal with a condition of severe psychological stress, severe depression, anxiety, the risk of an arrhythmia from the chronic exposure to lead and the underlying diagnoses of obstructive sleep apnea and hypertension. It is my opinion that all of these conditions played a contributory role in the ultimate demise of Mr. Alberto Rubio of a cardiopulmonary arrest.

(Applicant's exhibit 32, Pietruszka report dated July 28, 2021, pp. 21-23, footnotes to medical articles omitted.)

Thus, Dr. Pietruszka opined that it was not only the decedent's industrial psychological pathology that contributed to his cardiopulmonary arrest, but also the decedent's industrial sleep disorder. Defendant ignores this aspect of Dr. Pietruszka's medical opinion, which is unrebutted. We agree with the WCJ that the medical opinions of Dr. Pietruszka and Dr. Lamm are substantial evidence in support of the WCJ's decision. (See *Guerra v. Workers' Comp. Appeals Bd. (Rodas)* (2016) 246 Cal.App.4th 1301 (81 Cal.Comp.Cases 324) [Circumstantial evidence and inferences arising from reasonable probabilities flowing from the evidence are sufficient to support an award.])

Finally, we note defendant contends that the WCJ erred in following *South Coast Framing v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291 [80 Cal.Comp.Cases 489], with defendant arguing that the facts of *South Coast* are different from the facts of this case. We are not persuaded. The WCJ correctly found guidance in *South Coast* not for its facts, but for the well-settled legal principle that the causation requirement of workers' compensation is satisfied where the connection between the employment and injury or death is a contributing cause of the injury or death. (*South Coast, supra*, 61 Cal.4th at 298.)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 23, 2024

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

**ALBERTO RUBIO (DECEASED)
AJAYI LAW GROUP, A PLC
LAW OFFICE OF DENNIS J. HERSHEWE
EMPLOYMENT DEVELOPMENT DEPARTMENT**

JTL/ara

*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

I
INTRODUCTION

Defendant General Motors Corporation, permissibly self-insured, and administered by Sedgwick Claims Management Services, has through its counsel of record herein filed a timely, verified petition for reconsideration of the May 28, 2024 Findings and Award Re: Death Benefits. The Findings and Award was served on June 3, 2024, and defendant's petition is dated June 26, 2024.

The petition contends that the evidence does not justify the award of death benefits to the widow of Alberto Rubio, Maria Del Socorro, in the sum of \$250,000.00, plus \$10,000.00 toward burial expenses, less attorney fees, and in so awarding these benefits the undersigned acted without or in excess of his powers, because there was no substantial evidence that Mr. Rubio's death arose out of and in the course of his employment with General Motors. The petition also contends that the findings and award should have been barred by the doctrines of res judicata and/or collateral estoppel, and that the findings and award were improperly based upon reports obtained pursuant to Labor Code § 4605.

II
FACTS

A trial on the issue of death benefits was held in case number ADJ10202584 on March 11, 2024. The parties stipulated that Alberto Rubio, while employed during the period January 19, 1976 through November 19, 2012, as a warehouseman, Occupational Group No, 360, at Los Angeles, California, by General Motors, sustained injury arising out of and in the course of employment to the lumbar spine, neck, bilateral shoulders, thoracic spine, bilateral upper extremities, bilateral knees, bilateral hands, sleep disorder, and psyche, and claims to have sustained injury arising out of and in the course of employment to heart, cardiovascular, right adrenal gland, hypertension, and coronary artery disease. The parties further stipulated that at the time of injury, the employer was permissibly self-insured, and at the time of injury, the employee's earnings were \$1,761.60 per week, warranting indemnity rates of maximum for temporary disability and maximum for permanent disability. The parties agreed that the employer has furnished some medical treatment. The parties also referred in their stipulations to the now final Amended Joint Findings and Award of May 19, 2023, which addressed *inter vivos* benefits that had accrued while Mr. Rubio was still living.

The issues submitted at trial on March 11, 2024 were injury arising out of and in the course of employment (with respect to the death claim), and attorney fees. More detailed issues raised by applicant's counsel with respect to the claim for death benefits included whether the widow is a total dependent entitled to \$250,000, whether the son is a partial dependent entitled to a total of \$290,000, and whether the widow is entitled to burial expenses of \$8,865.46. More detailed issues raised by defendant's counsel with respect to the claim for death benefits included whether the death claim is barred by the Statute of Limitations, whether the death claim is barred by Res Judicata, whether the death claim is barred by Collateral Estoppel, whether the purported

dependents have proffered sufficient evidence so as to establish dependency whether total or partial, whether Dr. Pietruszka may be properly considered the treating physician; whether sufficient documentation of a burial expense has been established; and whether there is sufficient evidence demonstrating treatment of the liver in order to treat the low back. Applicant's counsel raised *Reynolds vs. WCAB* 12 Cal.3d 726 as a bar to the statute of limitations defense, Res Judicata, and Collateral Estoppel.

Additional exhibits were admitted over objection, as follows: Applicant's 32 is a medical report of Marvin Pietruszka, M.D., dated July 28, 2021; Applicant's 33 is a medical report of Marcia Lamm, Ph.D., dated August 22, 2023; Applicant's 34 is a medical report of Marcia Lamm, Ph.D., dated January 5, 2023 (which appears to be the same as the exhibit previously marked and admitted as Applicant's 31); Applicant's 35 is a medical report of Marcia Lamm, Ph.D., dated June 29, 2022 (which appears to be the same as the exhibit previously marked and admitted as Applicant's 24); Applicant's 36 is a medical report of Marcia Lamm, Ph.D., dated April 26, 2022 (which appears to be the same as the exhibit previously marked and admitted as Applicant's 25); Applicant's 37 is an application for death benefits, dated June 4, 2020.

Applicant's 38, a letter to the WCAB to amend the application for death benefits dated November 9, 2023, was marked for identification only. Defendant objected to Exhibit 38 as the amendment came after the MSC and the parties had already submitted a Pre-Trial Conference statement. Defendant also objected to this exhibit as being timely and improper. A ruling on the objection was deferred to the Opinion on Decision. Defendant's objection is overruled, and Applicant's 28 admitted into evidence, because the letter appears to have been served contemporaneously as an amendment to pleadings herein, and presumably defendant is sufficiently apprised of the state of the pleadings to adjudicate them at this time without further delay. As an aside, Applicant's 38 did not need to be moved into evidence in the first place, because it is a pleading that frames what is sought to be proved and not evidence itself.

Applicant's 39, a bill for burial expenses dated March 4, 2020, was also marked for identification only. Defendant objected to Applicant's Exhibit 39, alleging that the bill for burial services had not been served on defendant. Applicant's counsel responded that the bill for burial expenses was served on defendant on March 1, 2024. A ruling on this objection was deferred to the Opinion on Decision. Defendant's objection is overruled, and Applicant's 39 is admitted into evidence, because it appears from the proof of service attached to the receipts for burial expenses that these documents were in fact served on defendant as applicant's counsel noted, and the documents are necessary to a fair and accurate hearing on the issue of death benefits. No specific form of prejudice to defendant is identified in the objection to using these specific figures as opposed to relying upon the general and un rebutted substance of the widow's testimony that funeral expenses were over \$25,000. Indeed, it seems to be to defendant's benefit that more specific written proof be adduced in lieu of sole reliance on un rebutted testimony, and the receipts in Applicant's 39 were served about 10 days before defense counsel received an opportunity to cross-examine the widow about their contents, and according to defendant's post-trial brief, these documents were received by email on October 23, 2023. Unless a due process violation from use of this evidence can be identified concretely and with specificity, as opposed to generally in the abstract, the evidence must be considered to achieve the constitutional mandate of substantial justice (California State Constitution, Article XIV, Section 14). Further protecting the broad inclusion of such necessary

evidence is the provision of California Labor Code 5709 that no order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure.

Applicant's 40, an article from NIOSH on antimony, dated March 4, 2020, was also marked for identification only. Defendant objected to Applicant's Exhibit 40 contending that it lacked relevance, that it required expert testimony to interpret, and that it was beyond the scope of the issues regarding death benefits. Applicant responded with an offer of proof that this was a chemical that was noted in Dr. Pietruszka's report. Applicant is giving it to the Court to show that the battery exposure did have antimony on it and it was a gray material, and the widow would testify that she separately cleaned the decedent injured worker's clothes with this gray material. A ruling on this objection was also deferred to the Opinion on Decision. Defendant's objection is overruled, and Applicant's 40 is admitted into evidence, although it is noted that its weight and relevance is indeed limited to the extent that application of its contents to the facts herein does not require medical expertise.

Admitted into evidence as Defendant's AA were excerpts of subpoenaed records from Keck Hospital reports, of various dates. Admitted as Defendant's BB was a denial notice on the dependency benefits issue, dated June 2, 2020. Admitted as Defendant's CC was a death certificate dated March 11, 2020. The Court also took Judicial Notice of all of the contents of FileNet in ADJ10202584.

Alberto Rubio's widow, Maria Del Socorro Rubio, was sworn as a witness at trial and testified through a Spanish interpreter. She confirmed that Alberto Rubio was her husband. They were married on October 21, 1972. He died on March 3, 2020. Ms. Rubio last worked in 2007 and was totally dependent on her husband until his death. Ms. Rubio's husband paid for all household expenses before his death.

Ms. Rubio testified that her son also lived with Ms. Rubio and her husband. His name is Alberto, Jr. He still lives with her and has been working. He gives Ms. Rubio \$500 per month. Ms. Rubio has three daughters. She researched the cost of a one bedroom apartment in South Gate with her daughters' help and believes it is about \$1,800 per month.

Ms. Rubio believes her husband was injured while working at General Motors, and she filed a claim and application for death benefits. She did not receive a Notice of Potential Entitlement to Death Benefits from an insurance company after May 27, 2020. Ms. Rubio doesn't remember exactly what the burial expenses were, but thinks there was a balance of about \$8,800 on a much larger total that was over \$25,000. Her daughter Gabriella took care of it.

Ms. Rubio finished the 4th grade in Mexico. Dr. Pietruszka asked her questions, but she doesn't remember exactly what they were. They did talk about her husband. Ms. Rubio believes that her husband's death was because of his work, but she doesn't recall if she believed that before May 27, 2020. She does recall that her husband came home from work complaining of pain.

Upon cross-examination, Ms. Rubio testified that she doesn't remember exactly when her husband first returned from work complaining of pain. She believes the \$8,800 balance was part of her

husband's funeral expenses and was only what they still had to pay out of a total of more than \$25,000. She would have to look for the funeral bill, but believes it was paid by her daughters Adriana and Gabriella. Her daughters helped her investigate how much an apartment would cost in South Gate about two years ago after her husband died. This was to see how much a room could be rented for to another person. Alberto, Jr. started giving Ms. Rubio \$500 a month about five years ago when he started his current job. She investigated rent costs with her daughters to see for how much she could rent a room to another person. Ms. Rubio was a homemaker in 2007 staying at home and taking care of Alberto.

Upon further direct examination, Ms. Rubio testified that she had Mr. Rubio buried at a Catholic cemetery in Montebello. She got a bill for this but her daughters have it and took care of it. Ms. Rubio agree that the bill would be the best evidence of the funeral and burial cost. Ms. Rubio recalls her husband complaining of pain after work, and she also recalls him complaining of anxiety.

Trial briefs and responsive briefs were submitted by both sides. Applicant's trial brief argued that the issues of statute of limitations, res judicata and collateral estoppel were all raised previously in 2018 and therefore decided by the prior Findings and Award in this case. However, as was explained in the opinion on decision that accompanied the Findings and Award of death benefits, a dependency claim is subject to its own independent statute of limitations, res judicata, and collateral estoppel arguments, so these issues have not previously been litigated, at least not with respect to the claim for death benefits. Defendant's response to applicant's trial brief correctly made this point, that the inter vivos claim and the death claim are separate causes of action with separate statutes of limitations.

The trial brief submitted by applicant's counsel further argued that the notice of denial of the death claim was untimely and defective because it was not in Spanish and the defendant did not provide the widow with a claim form or a notice of potential eligibility for benefits. These points about the notice of denial were found to be immaterial in light of the fact that the dependency claim in this case is clearly not barred by the applicable statute of limitations and is supported by unrebutted medical evidence, as was explained in the opinion on decision. As was correctly pointed out in applicant's trial brief, the last furnishing of benefits (in the form of payment of permanent disability indemnity) was only 12 weeks and two days before the application was amended herein to include death benefits. This satisfies the requirements of Labor Code Section 4700(a)(2). With respect to subsection (b), the application for death benefits, both judicially noticed as filed herein and admitted as Applicant's 37, is dated June 4, 2020, less than one year from the applicant's death on March 11, 2020.

With respect to the medical evidence, the Findings and Award of death benefits relied upon the reports of Dr. Pietruszka and Dr. Lamm, which linked work-related psychological stress and an industrial sleep disorder with Mr. Rubio's death. Defendant urged that since Dr. Hirsh was the Agreed Medical Evaluator (AME) in internal medicine, and he found no industrial injury in the form of liver cancer, chronic lung disease, or umbilical hernia, and because no internal injury was found or awarded based on Dr. Hirsch's opinions, it follows that there should be no finding of an industrial death, but the opinion on decision explained that Dr. Hirsch's opinions are outdated and not substantial evidence because his last report was from 2017 and his last deposition was taken

on May 2, 2018, both before applicant's death. Accordingly, Dr. Hirsch never directly addressed Mr. Rubio's death and its causes. Also, as explained in the opinion on decision, Mr. Rubio's death, according to Dr. Pietruszka (Applicant's 32) and Dr. Lamm (Applicant's 33), as well as his death certificate (Defendant's CC), was *not* solely the result of conditions that were previously found to be non-industrial. In fact, the opposite is true: Mr. Rubio's death has been attributed at least in part, to the role of psychological conditions that were previously found to be industrial, based on the opinions of Dr. Lamm. The now-final Joint Findings and Order of May 19, 2023 found industrial injury to the lumbar spine, neck, bilateral shoulders, thoracic spine, bilateral upper extremities, bilateral knees, bilateral hands, sleep disorder, and psyche. Dr. Pietruszka found that Mr. Rubio's already-established industrial conditions, and in particular his depression and anxiety and their sequelae contributed to or hastened his death in 2020 to some degree. Defendant did not ask Dr. Hirsch to review that opinion or opine on causes of death. Dr. Lamm did review Dr. Pietruszka's reporting on the subject, and she agreed that conditions within her field of expertise, psychology, played a contributing causal role to Mr. Rubio's death from acute cardiopulmonary arrest:

I have considered the opinions of Dr. Pietruszka, who provides a detailed analysis of the physiologic impact of chronic stress, depression, and anxiety on cardiopulmonary disease and obstructive sleep apnea. There is extensive literature linking the correlation with chronic stress and cardiovascular disease, hypertension, and sleep disorders. Judge Feddersen has awarded psychological injury and permanent disability, which resulted from Mr. Rubio's cumulative trauma injuries. It would follow that if there was industrial injury to the psyche, then there would be physiological sequelae involving cardiopulmonary disease, hypertension, and sleep disorders, as described by Dr. Pietruszka.

Did Mr. Rubio's industrial injury and parts of the body weaken his physical and emotional state, contributing to his demise on March 3, 2020?

I am in agreement with Dr. Pietruszka's findings that Mr. Rubio['s] chronic stress, anxiety, and depression were contributory factors of his death - primarily caused by Acute Cardiopulmonary Arrest.

(Medical Report of Marcia Lamm, Ph.D., dated August 22, 2023, admitted as Applicant's 33, at page 7.)

Defendant General Motors Corporation filed a timely, verified petition for reconsideration of the May 28, 2024 Findings and Award Re: Death Benefits through its counsel of record herein. The petition does not discuss the statute of limitations but does contend that the evidence does not justify the award of death benefits to the widow of Alberto Rubio, Maria Del Socorro, and in awarding those benefits the undersigned acted without or in excess of his powers, because there was no substantial evidence that Mr. Rubio's death arose out of and in the course of his employment with General Motors. The petition also contends that the Findings and Award should have been barred by the doctrines of res judicata and/or collateral estoppel, and that the findings and award were improperly based upon reports obtained pursuant to Labor Code § 4605.

III DISCUSSION

Any issue regarding statutes of limitations or the extent of dependency or burial expenses need not be discussed at this point, because under Labor Code § 5904, a petitioner for reconsideration "shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration."

The gravamen of defendant's petition for reconsideration is centered upon the concept that there is no substantial evidence linking Mr. Rubio's death with conditions arising out of and in the course of employment. The Workers' Compensation Appeals Board (WCAB) has held, *en banc*, that "it is well established that any decision of the WCAB must be supported by substantial evidence." (*Escobedo v. Marshalls* (2007) 70 Cal. Comp. Cases 604, 620, citing Labor 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].) "In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability." (*Escobedo*, cited above, 70 Cal. Comp. Cases 604, 620, citing *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413,416-417, 419 [33 Cal. Comp. Cases 660], *Travelers Ins. Co. v. Industrial Acc. Com. (Odello)* (1949) 33 Cal.2d 685, 687-68) [14 Cal. Comp. Cases 54], *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal. App.4th 1692, 1700-1702, 1705 [58 Cal. Comp. Cases 313].) "Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess." (*Escobedo v. Marshalls*, cited above, 70 Cal. Comp. Cases 604, 620, citing *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal. Comp. Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal. Comp. Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd.*, *supra*, 68 Cal.2d at p. 798.) "Further, a medical report is not substantial evidence unless it sets forth the 'reasoning behind the physician's opinion, not merely his or her conclusions. (*Escobedo*, cited above, 70 Cal. Comp. Cases 604,621, citing *Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal. 2d 399, 407 (a mere legal conclusion does not furnish a basis for a finding), *Zemke v. Workmen's Comp. Appeals Bd.*, *supra*, 68 Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence), and *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based).)

So, *Escobedo* summarizes a half-century of jurisprudence on the issue of what constitutes substantial medical evidence as follows: a doctor's report must provide reasoning, not merely conclusions, that are based on relevant facts, an adequate history and examination, correct legal theories, and based on reasonable medical probability, not guesswork. The reports on which the undersigned relied in this case met these basic criteria. There are reasons and a basis for each doctor's assessment of the cause of death, which was not liver cancer but the sequelae of a

compensable and awarded injury to the psyche. Under Article XIV, Section 4 of the California State Constitution, the workers' compensation system is intended to operate "without incumbrance," so the requirements of substantial evidence are not intended to create insurmountable hurdles, nor is the standard of reasonable medical probability intended to be misconstrued as requiring certitude. [*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660].] There is also no requirement that treating and consulting physicians' reports be disregarded simply because they were not reviewed by an AME or QME. To the extent that defendant failed to obtain any opinion from Dr. Hirsch regarding the relevant facts of applicant's death, or failed to provide an adequate history thereof, or failed to ask Dr. Hirsch to apply correct legal theories regarding the threshold of industrial causation in a death case to Mr. Rubio's death, development of the record is not required unless the deficiency or omission makes the conclusions of Dr. Pietruszka and Dr. Lamm improbable. It was incumbent on defendant to have the opinions of Dr. Pietruszka and Dr. Lamm reviewed by another evaluator in order to obtain a rebuttal to their expert opinions before the close of discovery, for which it appears that there was adequate opportunity. In this case, there seems to be sufficient basis for the medical expert opinions of Dr. Lamm and Dr. Pietruszka to support their conclusion as explained above.

The reports of Dr. Pietruszka and Dr. Lamm linked work-related psychological stress and an industrial sleep disorder with Mr. Rubio's death, which is an issue that was not even considered by Dr. Hirsch. Defendant has urged that since Dr. Hirsch was the Agreed Medical Evaluator (AME) in internal medicine, and he found no industrial injury in the form of liver cancer, chronic lung disease, or umbilical hernia, and because no internal injury was found or awarded based on Dr. Hirsch's opinions, it follows that there should be no finding of an industrial death. However, applicant's counsel has correctly pointed out that Dr. Hirsch's opinions are outdated and not substantial evidence, because his last report was from 2017 and his last deposition was taken on May 2, 2018, both before applicant's death. Accordingly, Dr. Hirsch never directly addressed Mr. Rubio's death and its causes. The opinion on decision agreed with applicant's counsel that this is indeed a fatal shortcoming in the expert opinion of Dr. Hirsch on the subject of applicant's death. Dr. Hirsch never addressed Mr. Rubio's death from both acute cardiopulmonary arrest and malignant neoplasm of the liver, because he never knew about the death or to what it had been attributed, and apparently the defendant never asked him to address this issue despite having the opportunity to do so. Dr. Hirsch did not specifically comment on whether there was any internal (or non-internal) cause of Mr. Rubio's death. This is particularly significant in light of the fact that [an] industrial contributing cause is sufficient to warrant an award of unapportioned death benefits (See *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291 [80 Cal. Comp. Cases 489]). Dr. Hirsch's testing and comments ruling out cardiopulmonary problems years prior to Mr. Rubio's death from an acute cardiopulmonary arrest do not suffice to rebut the specific opinions of Dr. Pietruszka or Dr. Lamm regarding the role of industrial anxiety and depression in causing a cardiac arrest, an event of which Dr. Hirsch was not even aware.

Turning to the petition's contention that death benefits should have been precluded by the doctrines of res judicata and/or collateral estoppel, there is no prior adjudication of the issue of what caused Mr. Rubio's death, which is a very different question than the question of what caused disability and the need for medical care while he was alive. [See *State Comp. Ins. Fund v. ReadyLink Healthcare, Inc.* (2020) 50 Cal.App.5th 422, 446-448.] The irony of this argument is that while the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) clearly do

not serve to bar the new issue of whether a previously awarded injury to the psyche caused sequelae that subsequently resulted in applicant's death, these doctrines do appear to [undermine] defendant's arguments that question whether the reports of Dr. Lamm are admissible or can be used as a legally sufficient basis to support an award of compensable injury, when her reports have previously been used to establish a now-final award of injury to the psyche. Dr. Lamm was not a consulting physician merely obtained pursuant to Labor Code § 4605; as explained in the prior Findings and Award of May 19, 2023, she was...a treating physician for applicant's previously-denied injury to the psyche. As a treating physician, Dr. Lamm properly requested an internal medicine consult, which was then obtained through Dr. Pietruszka and properly reviewed by Dr. Lamm. To the extent that Dr. Pietruszka's consulting opinion could be considered one obtained pursuant to Labor Code § 4605, it has been reviewed by an authorized treating physician on an awarded industrial injury to the psyche and accordingly does not form the sole basis of the award of death benefits. While defendant's petition correctly points out that Dr. Lamm is deferring to Dr. Pietruszka as a medical doctor, it is incorrect to accuse Dr. Lamm of having no opinion of her own regarding the sequelae of an injury to the psyche. And, to the extent that defendant disagreed with Dr. Lamm's conclusions after she reviewed all relevant other opinions, literature, and the entire record herein including the prior *inter vivos* Finding and Award, it was incumbent upon defendant to attempt in some fashion to attempt to rebut that informed opinion. It appears that defendant did not make any effort to do this.

Defendant's trial brief cited *Blake v. Workers' Comp. Appeals Bd.*, 42 Cal. Comp. Cases 909 (Cal. App. 2d, Dist., 1977) to argue that a death claim that is based on a condition that was previously found to be non-industrial is barred by res judicata, or collateral estoppel. Applicant's response to this argument was that res judicata and collateral estoppel were already determined adversely when not addressed by [a previous WCJ's] original decision of April 3, 2019 or in defendant's petition for reconsideration of April 26, 2019. As explained in the opinion on decision, both arguments miss an important distinction between the present case and facts in the *Blake* case: Mr. Rubio's death, according to Dr. Pietruszka (Applicant's 32) and Dr. Lamm (Applicant's 33), as well as his death certificate (Defendant's CC), was not solely the result of conditions that were previously found to be non-industrial. [...] Mr. Rubio's death has been attributed at least in part, to the role of psychological conditions that were previously found to be industrial, and the industrial character of those conditions (and, by extension, their compensable consequences) should not be re-litigated.

The now-final Joint Findings and Order of May 19, 2023 found industrial injury to the lumbar spine, neck, bilateral shoulders, thoracic spine, bilateral upper extremities, bilateral knees, bilateral hands, sleep disorder, and psyche. It [is not determinative] that Mr. Rubio's liver cancer was found by Dr. Hirsch to be non-industrial, or that res judicata and collateral estoppel were not previously addressed, because what is being litigated now with respect to causes of death is significantly different than what was being litigated before, with respect to compensable *inter vivos* conditions. The primary question in previous proceedings was: Which of Mr. Rubio's conditions are compensable, and to what extent? The primary question in this proceeding is: Did any of Mr. Rubio's already-established industrial conditions, and in particular depression and anxiety, or any sequelae thereof, contribute to or hasten his death in 2020 [...] ? Dr. Pietruszka said yes in his report of July 28, 2021. Dr. Hirsch was not even asked to review that opinion or opine on causes of death. Dr. Lamm does appear to have been sufficiently apprised of all salient facts, and she agrees that conditions within her field of expertise, psychology, played a contributing causal role

to Mr. Rubio's death from acute cardiopulmonary arrest. This is Dr. Lamm's reasoned opinion after considering all relevant evidence, and not simply Dr. Pietruszka's opinion taken by itself as the basis for an award of death benefits. As Dr. Lamm explained, "[t]here is extensive literature linking the correlation with chronic stress and cardiovascular disease, hypertension, and sleep disorders. [The WCJ] has awarded psychological injury and permanent disability, which resulted from Mr. Rubio's cumulative trauma injuries. It would follow that if there was industrial injury to the psyche, then there would be physiological sequelae involving cardiopulmonary disease, hypertension, and sleep disorders, as described by Dr. Pietruszka... I am in agreement with Dr. Pietruszka's findings that Mr. Rubio[s] chronic stress, anxiety, and depression were contributory factors of his death - primarily caused by Acute Cardiopulmonary Arrest." (Medical Report of Marcia Lamm, Ph.D., dated August 22, 2023, admitted as Applicant's 33, at page 7.) The general reference to "extensive literature" does not invalidate the opinion any more than would the phrase, "the general experience in my field is..." or, "expert consensus on this question is..." This is not surmise or conjecture; it is a reasoned opinion of a qualified expert, and it is sufficient to support an award of death benefits, as Dr. Lamm explains how and why she believes Mr. Rubio's awarded injury to the psyche played at least some role as a contributory industrial cause of his death.

IV RECOMMENDATION

It is respectfully recommended that the petition be denied.

DATE: 7/9/2024

Clint Feddersen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE